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Volume II

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NOTE

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The present document contains annexes VIII and IX of the report of the Human Rights Committee. Chapters I to VIII and annexes I to VII and X are contained in volume I.

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Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights

A. Communication No. 373/1989, Lennon Stephens v. Jamaica (views adopted on 18 October 1995, fifty-fifth session)

Submitted by: Lennon Stephens [represented by counsel]

Victim: The author

State party: Jamaica

Date of communication: 20 July 1989 (initial submission)

Date of decision on admissibility: 12 October 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 October 1995,

Having concluded its consideration of communication No. 373/1989, submitted to the Human Rights Committee by Mr. Lennon Stephens under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication (initial submission dated 20 July 1989 and subsequent correspondence) is Lennon Stephens, a Jamaican sentenced to death in 1984, currently serving a sentence of life imprisonment at the Rehabilitation Centre in Kingston. He resubmits his complaint, which had earlier, on 26 July 1988, been declared inadmissible on the ground of non-exhaustion of domestic remedies, since the author had not then sought leave to appeal to the Judicial Committee of the Privy Council. On 6 March 1989, the Judicial Committee dismissed the author's petition for special leave to appeal. The author now claims to be a victim of violations by Jamaica of article 7, article 9, paragraphs 2 to 4, article 10, paragraph 1, and article 14, paragraphs 3 (c) and 5, of the Covenant. He is represented by counsel.

The facts as submitted by the author

2.1 The author is accused of having murdered George Lawrence in the Parish of Westmoreland, at approximately 11 a.m. on 22 February 1983. The victim's body was never recovered. The prosecution relied on the evidence of three witnesses, who had been working together with, or in the vicinity of, the author on the property of a Mr. Williston at Charlemont, Westmoreland. Thus, witness Linford Richardson testified that he saw the author and the deceased "wrestling" when the gun was discharged. The same witness said that he saw the author wrap the body in tarpaulin and carry it away. A second witness, Sylvester Stone,

testified that he heard an explosion, ran outside and saw the author standing "over a man" who was lying on the ground. The third witness, a contractor, stated that he had seen the author running after "a man" (whom he did not identify), that the author caught up with the man, upon which both stopped. The witness testified that the author then took something from his pocket and gestured with it in the direction of the other man, upon which there was an explosion and the other man dropped to the ground.

2.2 The author contended, in a sworn statement during the trial, that on the day in question he was working on the property of Mr. Williston when the deceased approached him with something shaped like a gun under his waist and asked to see Mr. Williston. The author challenged Mr. Lawrence in the belief that the latter intended to harm Mr. Williston, whereupon the deceased went for the gun. The author wrestled with the deceased, and during the fight, the gun went off and the deceased fell to the ground. The author went home, told his mother what had happened and then surrendered to the police.

2.3 After surrendering to the police on 22 February 1983, the author was detained. It is submitted that the investigating officer, Detective Inspector Ben Lashley, only cautioned him on 2 March 1983, that is, eight days later, telling him that "he was conducting investigations into a case of murder" and that it was alleged "that he shot one George Lawrence".

2.4 The author was subsequently accused of murder and tried in the Westmoreland Circuit Court on 21 and 22 February 1984. He was found guilty as charged and sentenced to death on 22 February 1984. His appeal was dismissed by the Court of Appeal on 4 February 1987, nearly three years later. As stated before, the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal on 6 March 1989.

2.5 As to the course of the trial, the author contends that the trial judge failed to direct the jury properly on the issue of self-defence, although he had indicated that he would do so. He further indicates that one of the prosecution witnesses was the deceased's uncle, who had had previous serious but unspecified differences with the author.

2.6 Throughout the trial and appeal, the author was represented by legal aid attorneys. A London law firm represented him pro bono before the Judicial Committee of the Privy Council.

2.7 The author contends that he has exhausted domestic remedies. He notes that while he could theoretically still file a constitutional motion, that remedy is not in reality available to him, as he is destitute and no legal aid is made available by the State party for the purpose of constitutional motions.

The complaint

3.1 Counsel submits that Mr. Stephens is a victim of a violation of articles 7 and 10, paragraph 1, of the Covenant because of his detention, for 7 years and 10 months, on death row. He notes that between his conviction in February 1984 and his classification as a non-capital offender,[a] the author was confined to death row under deplorable conditions, constantly facing the prospect of imminent execution. Counsel notes that such a prolonged period of detention under conditions of constant anxiety and "agony of suspense" amounts to cruel and inhuman treatment within the meaning of article 7. Reference is made to the judgement of the Judicial Committee of the Privy Council in the case of Pratt

and Morgan, in which the complainants' prolonged detention on death row was held to be contrary to section 17 (1) of the Jamaican Constitution.[b]

3.2 Counsel further claims a violation of article 10, paragraph 1, of the Covenant, because of the bad conditions of detention the author was, and remains, subjected to. He does so by reference to two reports from two non-governmental organizations on prison conditions in Jamaica (May 1990) and on deaths and ill-treatment of prisoners at St. Catherine District Prison, where the author was detained until December 1992. The reports complain about gross overcrowding, total lack of sanitation and medical or dental care, inadequate food in terms of nutrition, quantity and quality, and lengthy confinement in cells.

3.3 It is submitted that the circumstances of the author's pretrial detention amount to a violation of article 9, paragraphs 2 to 4, of the Covenant. Thus, the trial transcript reveals that the author was detained on 22 February 1983 but only "cautioned" eight days later (2 March 1983). That situation, it is submitted, is contrary to article 9, paragraph 2, which requires that a general description of the reasons for the arrest must be given when it occurs and that, subsequently, the specific legal reasons must be provided. It is claimed that in view of the eight-day delay between arrest and "cautioning", the author was not "promptly informed of any charges against him".

3.4 The situation described above is also said to amount to a violation of article 9, paragraph 3: as Mr. Stephens was only charged eight days after being detained, he was not "promptly" brought before a judicial officer within the meaning of that provision. Reference is made to a number of views adopted by the Committee.[c] Consequently, his rights under article 9, paragraph 4, were also violated, as he was not afforded in due course the opportunity to obtain, on his own initiative, a decision on the lawfulness of his detention by a court of law.

3.5 It is submitted that a delay of almost three years (35 and a half months) between conviction and appeal amounts to a violation of article 14, paragraphs 3 (c) and 5, of the Covenant. Counsel concedes that the reasons for the delay remain unclear despite many attempts by his law firm and the Jamaica Council for Human Rights to contact the author's lawyer for the trial and to ascertain the reasons for the delay. He emphasizes, however, that Mr. Stephens did nothing to cause, or contribute to, the delay between his conviction and the hearing of the appeal. The same delay is also said to constitute a violation of article 14, paragraph 1, by reference to the Committee's views in Muñoz v. Peru, in which it was held that "the concept of a fair hearing necessarily entails that justice be rendered without undue delay".[d]

3.6 Finally, counsel submits that the author has been subjected to ill-treatment by prison warders of St. Catherine District Prison, in violation of articles 7 and 10, paragraph 1, of the Covenant. Thus, in the course of 1991, a warder allegedly hit the author over the head until he lost consciousness and had to be taken to hospital. In a questionnaire filled out by the author for the Jamaica Council for Human Rights, he notes that "he still has problems with his right eye as a result". The Office of the Parliamentary Ombudsman was contacted about the matter, and his office, in a letter dated 21 September 1993 addressed to counsel, replied that the issue "would receive the most prompt attention". However, no further action had been taken by the Ombudsman as of the spring of 1994. Counsel argues that the author has exhausted available domestic remedies in respect of the complaint, as the lack of replies from the

Ombudsman and other bodies in Jamaica has made it virtually impossible to pursue the complaint further.

The State party's information on admissibility and the author's comments thereon

4.1 On 15 September 1989, the communication was transmitted to the State party under rule 86 of the rules of procedure of the Committee; the State party was requested not to execute the author while his case was pending before the Committee. The State party was further informed that additional clarifications were being sought from the author and his counsel. Some limited clarifications from the author were received in 1990 and 1991. During the Committee's forty-fifth session, in July 1992, it was decided to transmit the communication to the State party under rule 91 of the rules of procedure, seeking information and observations about the admissibility of the case. The request under rule 86 was reiterated. Both requests were transmitted to the State party on 5 September 1992.

4.2 In a submission dated 27 April 1993, the State party regrets that "in the absence of a communication setting out the facts on which the author's complaints are based, as well as the articles of the Covenant which are alleged to have been violated, it will not be possible to prepare a response for the Committee". The submission crossed with a reminder sent to the State party by the Committee on 6 May 1993; on 28 July 1993, the State forwarded an additional submission.

4.3 In the latter submission, the State party notes that "it appears that the author is complaining of breaches of articles 7 and 10 of the Covenant". In the State party's opinion, that complaint is inadmissible on the grounds of non-exhaustion of domestic remedies. Thus, the author retains the right to seek constitutional redress for the alleged violation of his rights, by way of constitutional motion. Furthermore, the author would be entitled "to bring a civil action for damages for assault in relation to any injuries he allegedly sustained as a result of ill-treatment during his incarceration. This is another remedy to be exhausted before the communication is eligible for consideration by the Committee."

5.1 In his comments on the State party submissions, dated 17 March 1994, counsel puts forward several new claims, which are detailed in paragraphs 3.1 and 3.3 to 3.5 above. In particular, he submits that a constitutional motion would not be an available and effective remedy in the circumstances of the author's case, as Mr. Stephens is penniless and no legal aid is made available for constitutional motions.

5.2 Counsel's comments were transmitted, together with all the enclosures, to the State party on 5 May 1994, with a further request for comments and observations on counsel's submission. No further submission had been received from the State party as of 30 September 1994.

The Committee's admissibility decision

6.1 The Committee considered the admissibility of the communication during its fifty-second session. It noted the State party's criticism referred to in paragraph 4.2 above but recalled that, under the Optional Protocol procedure, it was not necessary for an individual who claims to be a victim of a violation of any of the rights set forth in the Covenant explicitly to invoke the articles of the Covenant. It was clearly apparent from the material transmitted to the

State party that the author complained about issues related to his conditions of detention and his right to a fair trial.

6.2 The Committee noted that part of the author's allegations related to the instructions given by the judge to the jury with regard to the evaluation of evidence and the question of whether self-defence arose in the case. It reaffirmed that it is in principle for the appellate courts of States parties to review specific instructions to the jury by the judge, unless it is clear that said instructions were arbitrary or amounted to a denial of justice or that the judge manifestly violated his obligation of impartiality. The material before the Committee did not show that the judge's instructions to the jury in the case suffered from such defects; in particular, the issue of self-defence was put to the jury in some detail. That part of the communication was therefore deemed inadmissible under article 3 of the Optional Protocol.

6.3 Concerning the claims under articles 7 and 10 of the Covenant, relating to prison conditions in general, the Committee first noted that counsel had addressed the issue of prison conditions merely by reference to two reports from non-governmental organizations on prison conditions in Jamaica, without considering Mr. Stephens' personal situation on death row or at the Rehabilitation Centre in Kingston. It is further not apparent that the complaints had ever been brought to the attention of the competent Jamaican authorities. Accordingly, those claims were inadmissible under article 5, paragraph 2 (b), of the Protocol.

6.4 The Committee noted counsel's contention that the eight years and 10 months which Mr. Stephens spent on death row amounted to a violation of article 7 of the Covenant. While that issue had not been placed before the Jamaican courts by way of constitutional motions, it was uncontested that no legal aid was made available for that purpose and that the author was dependent on legal aid. In the circumstances, the Committee did not consider a constitutional motion to be an effective remedy in respect of that claim.

6.5 With respect to the claim of the author's ill-treatment on death row during 1991, the Committee noted the State party's claim that the case was inadmissible because of the author's failure to file a constitutional motion under section 25 of the Jamaican Constitution. It recalled that the author and his counsel attempted to have the alleged ill-treatment of Mr. Stephens investigated, in particular by the Office of the Parliamentary Ombudsman, but without result as of early 1994. It further recalled that the Supreme (Constitutional) Court of Jamaica had, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in those cases were dismissed. It also recalls, however, that the State party had repeatedly indicated that no legal aid was available for constitutional motions; as a result, the Committee concluded that, in the absence of legal aid, it was not precluded by article 5, paragraph 2 (b), from considering that aspect of the case.

6.6 Similar considerations applied to the author's claim under article 9, paragraphs 2 to 4, and article 14, paragraphs 3 (c) and 5. While it was possible in theory for the author to file a constitutional motion, he was effectively barred from doing so in the absence of legal aid. Mutatis mutandis, the considerations in paragraph 6.4 above applied.

6.7 On 12 October 1994, the Committee declared the communication admissible insofar as it appeared to raise issues under article 7, article 9, paragraphs 2

to 4, article 10, paragraph 1, and article 14, paragraphs 3 (c) and 5, of the Covenant.

The State party's observations on the merits and the author's comments thereon

7.1 In a submission dated 27 January 1995, the State party challenges counsel's reliance on the judgement of the Judicial Committee of the Privy Council in the case of Pratt and Morgan v. Attorney-General of Jamaica in respect of his argument under article 7 of the Covenant (length of detention on death row). By reference to the Committee's own views of 6 April 1989 in this case in which it had been held that delay by itself was not enough to constitute a breach of article 7 of the Covenant,[6] the State party contends that the Privy Council's judgement in Pratt and Morgan does not remove the necessity of determining on a case-by-case basis whether detention on death row for more than five years violates article 7. In the author's case, his failure to exhaust domestic remedies expeditiously to a large extent resulted in the delay in the execution of the capital sentence against him, prior to reclassification of his conviction to non-capital murder.

7.2 As to the alleged violation of article 9, paragraphs 2 to 4, the State party argues that the circumstances of the author's arrest and detention - namely, that he gave himself up to the police "in respect of the murder of Mr. Lawrence" - were such as to make him fully aware of the reasons for arrest and detention. In the circumstances, and given the difficulties the police experienced in locating the body of the deceased, the period of time the author spent in police custody (eight days) must be deemed reasonable. For the State party, the fact that the author surrendered to the police reinforces that point.

7.3 The State party contends that there is no substantiation to support the author's claim of a violation of article 14, paragraphs 3 (c) and 5. In particular, there is said to be no evidence that the cause of the delay was attributable to an act or omission on the part of the judicial authorities of Jamaica.

7.4 As to the alleged ill-treatment of Mr. Stephens on death row during 1991, the State party observes, in a submission of 13 March 1995, that there was no violation of articles 7 and 10, paragraph 1, of the Covenant, since the injuries suffered by the author resulted from the "use of reasonable force by a warder to restrain the applicant who had attacked the warder". Such use of reasonable force, the State party maintains, does not constitute a breach of articles 7 and 10, paragraph 1. It adds that the warder in question had to seek medical treatment himself as a result of the author's attack on him.

8.1 In his comments, counsel reaffirms that Mr. Stephens was subjected to inhuman and degrading treatment by virtue of his confinement, for eight years and 10 months, on death row. He points in particular to the length of the delay and the conditions on death row, and submits that an execution that would have taken place more than five years after conviction "would undoubtedly result in pain and suffering", which is precisely why the Judicial Committee recommended commutation to life imprisonment to all death row inmates in Jamaica incarcerated for five years or more.

8.2 Counsel dismisses as irrelevant that some of the delays in execution of the sentence may have been attributable to Mr. Stephens and adduces the Privy Council's own argument in Pratt and Morgan, in which it is held that "[i]f the appellate procedure enables the prisoner to prolong the appellate hearings over

a period of years, the fault is to be attributed to the appellate system that permits such delays and not the prisoner who takes advantage of it".

8.3 Counsel reiterates that his client was detained for eight days, "presumably incommunicado", without being told that he was being charged for murder. He refers to the Committee's general comment No. 8 (16), on article 9, which notes that delays under article 9, paragraph 3, must not exceed a few days and that pretrial detention should be an exception. He further observes that a requirement to give reasons at the time of the arrest has been imposed under common law and is now laid down in section 28 of the Police and Criminal Evidence Act of 1984. While he accepts that Mr. Stephens voluntarily went with his mother to the Montego Bay police station to "report the incident of the death of George Lawrence", he does not accept that it was reasonable in the circumstances to detain the author for eight days without charge.

8.4 In this context, he contends that article 9, paragraph 2, imposes the obligation (a) to give reasons at the time of the arrest and (b) to inform the person arrested "promptly" of any charges against him. On 22 February 1983, the only information the author was given was that he was under detention "until the police obtained more information". That, it is submitted, does not satisfy the requirements of article 9, paragraph 2.

8.5 As to the alleged violation of article 9, paragraph 3, counsel refers to the Committee's jurisprudence which emphasizes that delays between arrest and presentation to a judicial officer should not exceed a few days.[1] He also points out that in an individual opinion appended to one of those views by Committee member B. Wennergren it was submitted that the word "promptly" does not permit a delay of more than two or three days.[2]

8.6 Finally, counsel argues that article 9, paragraph 4, entitles any person subject to arrest or detention to challenge the lawfulness of that detention before a court without delay. He refutes the State party's argument that there was no denial of Mr. Stephens' right to do so by the judicial authorities but rather a failure on the part of the author himself to exercise the right to apply for writ of habeas corpus.

8.7 In a further submission dated 21 April 1995, counsel contends that without providing the evidence of an official report of the incident involving beatings of the author by a warder in 1991, the State party cannot dismiss the author's claim that he was subjected to inhuman and degrading treatment. He argues that the State party's reliance on the use of "reasonable force" to restrain the applicant who had attacked a warder is misleading, as both article 3 of the United Nations Code of Conduct for Law Enforcement Officials and the Correctional Rules of Jamaica prescribe behaviour which promotes the rehabilitation and humane treatment of detainees, implying that force may be used only when "strictly necessary".

8.8 Counsel refers to a report prepared in 1983 by the Parliamentary Ombudsman of Jamaica, in which he observed that Jamaican prison rules were systematically broken and that there were "merciless and unjustifiable beatings" of inmates by prison warders. Furthermore, the Jamaica Council for Human Rights is said to have been inundated with cases of abuse of prisoners since it was created in 1968. In addition, counsel points out that several prisoners have died following clashes between warders and inmates; the circumstances of the deaths of inmates often remain unclear and suspicious. Other prisoners are said to be targeted for abuse simply because they were witnesses to beatings and killings by prison warders. Four such incidents had occurred: on 28 May 1990 (death of

three inmates as a result of injuries inflicted by prison staff), on 30 June 1991 (four inmates killed by other inmates, who reportedly had been paid by prison warders) and on 4 May 1993 and on 31 October 1993 (four inmates shot dead in their cells).

8.9 It is submitted that in the light of this history of violence in the death row section of St. Catherine District Prison, the State party has in no way shown that the author was not a victim of violations of articles 7 and 10, paragraph 1, in the course of 1991. By reference to rule 173 of the Correctional Rules of Jamaica and rule 36 of the United Nations Standard Minimum Rules for the Treatment of Prisoners, which deal with internal complaints procedures, counsel submits that prisoners in Jamaica do not receive adequate redress from the prisons' internal complaints procedures. Some of them may be subjected to retaliatory measures if they testify against warders who have committed abuses. He reiterates that he has never been able to obtain a copy of the investigation into the beatings of Mr. Stephens and continues to question that the warder who injured his client used "no more force than [was] necessary" (rule 90 of the Correctional Rules of Jamaica).

Examination of the merits

9.1 The Human Rights Committee has examined the present communication in the light of all the information made available to it by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol, and bases its views on the following findings.

9.2 The Committee has noted the author's contention that his rights under articles 7 and 10, paragraph 1, of the Covenant have been violated because of the beatings he was subjected to on death row by a prison warder. It observes that while the author's allegation in this respect has remained somewhat vague, the State party itself concedes that the author suffered injuries as a result of use of force by warders; the author has specified that those injuries were to his head and that he continues to have problems with his right eye as a result. The Committee considers that the State party has failed to justify, in a manner sufficiently substantiated, that the injuries sustained by the author were the result of the use of "reasonable force" by a warder. It further reiterates that the State party is under an obligation to investigate, as expeditiously and thoroughly as possible, incidents of alleged ill-treatment of inmates. On the basis of the information before the Committee, it appears that the author's complaint to the ombudsman was acknowledged but was not investigated thoroughly or expeditiously. In the circumstances of the case, the Committee concludes that the author was treated in a way contrary to articles 7 and 10, paragraph 1, of the Covenant.

9.3 The Committee has noted counsel's argument that the eight years and 10 months Mr. Stephens spent on death row amounted to inhuman and degrading treatment within the meaning of article 7. It is fully aware of the ratio decidendi of the judgement of the Judicial Committee of the Privy Council of 2 November 1993 in the case of Pratt and Morgan, which has been adduced by counsel, and has taken note of the State party's reply in this respect.

9.4 In the absence of special circumstances, none of which are discernible in the present case, the Committee reaffirms its jurisprudence that prolonged judicial proceedings do not per se constitute cruel, inhuman and degrading treatment, and that, in capital cases, even prolonged periods of detention on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment.[h] In the instant case, a little over five years passed

between the author's conviction and the dismissal by the Judicial Committee of his petition for special leave to appeal; he spent another three years and nine months on death row before his sentence was commuted to life imprisonment under the Offences against the Person (Amendment) Act of 1992. Since the author was, at that time, still availing himself of remedies, the Committee does not consider that that delay constituted a violation of article 7 of the Covenant.

9.5 The author has alleged a violation of article 9, paragraph 2, because he was not informed promptly of the reasons for his arrest. However, it is uncontested that Mr. Stephens was fully aware of the reasons for which he was detained, as he had surrendered to the police. The Committee further does not consider that the nature of the charges against the author was not conveyed "promptly" to him. The trial transcript reveals that the police officer in charge of the investigation, a detective inspector from the parish of Westmoreland, cautioned Mr. Stephens as soon as possible after learning that the latter was being kept in custody at the Montego Bay police station. In the circumstances, the Committee finds no violation of article 9, paragraph 2.

9.6 As to the alleged violation of article 9, paragraph 3, it remains unclear on which exact day the author was brought before a judge or other officer authorized to exercise judicial power. In any event, on the basis of the material available to the Committee, this could only have been after 2 March 1983, i.e. more than eight days after Mr. Stephens was taken into custody. While the meaning of the term "promptly" in article 9, paragraph 3, must be determined on a case-by-case basis, the Committee recalls its general comment on article 9[3] and its jurisprudence under the Optional Protocol, pursuant to which delays should not exceed a few days. A delay exceeding eight days in the present case cannot be deemed compatible with article 9, paragraph 3.

9.7 With respect to the alleged violation of article 9, paragraph 4, it should be noted that the author did not himself apply for habeas corpus. He could have, after being informed on 2 March 1983 that he was suspected of having murdered Mr. Lawrence, requested a prompt decision on the lawfulness of his detention. There is no evidence that he or his legal representative did so. It cannot, therefore, be concluded that Mr. Stephens was denied the opportunity to have the lawfulness of his detention reviewed in court without delay.

9.8 Finally, the author has alleged a violation of article 14, paragraphs 3 (c) and 5, on account of the delay between his trial and his appeal. In this context, the Committee notes that during the preparation by a London lawyer of the author's petition for special leave to appeal to the Judicial Committee of the Privy Council, Mr. Stephens' legal aid representative for the trial was requested repeatedly but unsuccessfully to explain the delays between trial and the hearing of the appeal in December 1986. While a delay of almost two years and 10 months between trial and appeal in a capital case is regrettable and a matter of concern, the Committee cannot, on the basis of the material before it, conclude that the delay was primarily attributable to the State party rather than to the author.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation by Jamaica of articles 7, 9, paragraph 3, and 10, paragraph 1, of the Covenant.

11. The Committee is of the view that Mr. Stephens is entitled, under article 2, paragraph 3 (a), of the Covenant, to an appropriate remedy, including

compensation and further consideration of his case by the State party's Parole Board.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] Under the offences against the Person (Amendment) Act of 1992.

[b] Privy Council Appeal No. 10 of 2 November 1993.

[c] See Official Records of the General Assembly, Forty-sixth Session, Supplement No. 40 (A/46/40), annex XI.D, communication No. 253/1987 (Kelly v. Jamaica), views adopted on 8 April 1991, and appendix II; and ibid., Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.I, communication No. 277/1988 (Terán Jijón v. Ecuador), views adopted on 26 March 1992.

[d] Ibid., Forty-fourth Session, Supplement No. 40 (A/44/40), annex X.D, communication No. 203/1986, views adopted on 4 November 1988, para. 11.3.

[e] Ibid., annex X.F, communications Nos. 210/1986 and 225/1987 (Pratt and Morgan v. Jamaica), views adopted on 6 April 1989, para. 13.6.

[f] Ibid., Forty-sixth Session, Supplement No. 40 (A/46/40), annex XI.D, communication No. 253/1987 (Kelly v. Jamaica), views adopted on 8 April 1991, para. 5.8; and ibid., Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.I, communication No. 277/1988 (Terán Jijón v. Ecuador), views adopted on 26 March 1992, para. 5.3.

[g] Ibid., Forty-sixth Session, Supplement No. 40 (A/46/40), annex XI.D, appendix II.

[h] Ibid., Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.F, communications Nos. 270/1988 and 271/1988 (Barrett and Sutcliffe v. Jamaica), views adopted on 30 March 1992, para. 8.4.

[i] Ibid., Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, general comment No. 8 (16), para. 2.

B. Communication No. 390/1990, Bernard Lubuto v. Zambia (views adopted on 31 October 1995, fifty-fifth session)*

Submitted by: Bernard Lubuto

Victim: The author

State party: Zambia

Date of communication: 1 January 1990 (initial submission)

Date of decision on admissibility: 30 June 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 1995,

Having concluded its consideration of communication No. 390/1990, submitted to the Human Rights Committee by Mr. Bernard Lubuto under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Bernard Lubuto, a Zambian citizen, currently awaiting execution at the Maximum Security Prison in Kabwe, Zambia.

The facts as presented by the author

2.1 The author was sentenced to death on 4 August 1983 for aggravated robbery, committed on 5 February 1980. On 10 February 1988, the Supreme Court of Zambia dismissed his appeal.

2.2 The evidence led by the prosecution during the trial was that, on 5 February 1980, the author and two co-accused robbed Marcel Joseph Mortier of a motor vehicle (a Datsun vanette). One of the co-accused held Mr. Mortier at gunpoint, while stepping into his car. The author and the other co-accused were standing nearby in the bushes. The man with the gun fired shots at one of Mr. Mortier's labourers, who had been in the car and tried to run away from the spot. The man then drove off with the car, with Mr. Mortier still in it. Mr. Mortier then threw himself out of the vehicle and fell to the ground. Shots were fired at him but did not hit him. The author was later identified at an identification parade and the prosecution produced a statement signed by the author, in which he admits his involvement in the robbery.

2.3 The author testified during the trial that he had been arrested by the police on the evening of 4 February 1980, after a fight in a tavern. He was kept in the police station overnight; in the morning of 5 February, when he was about to be released, he was told that a robbery had taken place. He was taken to an office, where one of Mr. Mortier's labourers said that he answered the description of the robber. The author was then returned to the cells, but kept denying any involvement in the robbery. On 7 February 1980, he participated in

* The text of an individual opinion of one Committee member is appended.

an identification parade and was identified as one of the robbers by the labourer whom he had met earlier at the police station.

2.4 The author's testimony was rejected by the Court on the basis of the entries in the police register, which showed, inter alia, that the author was arrested late in the evening of 5 February 1980.

The complaint

3.1 The author claims that the trial against him was unfair, since the judge accepted all evidence against him, although a careful examination would have shown discrepancies in the statements made by the witnesses. He further claims that his legal aid lawyer advised him to plead guilty and that, when he refused, the lawyer failed to cross-examine the witnesses. The author claims that the death sentence imposed on him is disproportionate, since no one was killed or wounded during the robbery.

3.2 The author claims that he was tortured by the police to force him to give a statement. He alleges that he was beaten with a hose pipe and cable wires, that sticks were put between his fingers and that his fingers were then hit on the table, and that a gun was tied with a string to his penis and he was then forced to stand up and walk. The allegations were produced at the trial, but the judge considered, on the basis of the evidence, that the author's statement to the police was given freely and voluntarily.

3.3 Although the author does not invoke the provisions of the Covenant, it appears from the allegations and the facts which he submitted that he claims to be a victim of a violation by Zambia of articles 6, 7 and 14 of the Covenant.

The Committee's admissibility decision

4.1 The Committee considered the admissibility of the communication during its fifty-first session. It noted with concern the lack of cooperation from the State party, which had not submitted any observations on admissibility.

4.2 The Committee considered inadmissible the author's claims concerning the conduct of the trial. It recalled that it is, in principle, not for the Committee to evaluate facts and evidence in a particular case and it found that the trial transcript did not support the author's claims. In particular, it appeared from the trial transcript that author's counsel did in fact cross-examine the witnesses against the author.

4.3 The Committee considered that the length of the proceedings against the author might raise issues under article 14, paragraph 3 (c), and, as regards the appeal, article 14, paragraph 5, of the Covenant. The Committee further considered that the author's claim that the imposition of the death sentence was disproportionate, since no one was killed or wounded during the robbery, might raise issues under article 6, paragraph 2, of the Covenant, and that his claim that he was tortured by the police to force him to give a statement might raise issues under article 7 of the Covenant which should be examined on the merits.

4.4 Consequently, on 30 June 1994, the Human Rights Committee declared the communication admissible insofar as it appeared to raise issues under articles 6, 7 and 14, paragraphs 3 (c) and 5, of the Covenant. The State party was requested, under rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the author while his communication was under consideration by the Committee.

The State party's submission on the merits and the author's comments thereon

5.1 By submission of 29 December 1994, the State party acknowledges that the proceedings in Mr. Lubuto's case took rather long. The State party requests the Committee to take into consideration its situation as a developing country and the problems it encounters in the administration of justice. It is explained that the instant case is not an isolated one and that appeals in both civil and criminal cases take considerable time before they are disposed of by the courts. According to the State party, this is due to the lack of administrative support available to the judiciary. Judges have to write out every word verbatim during the hearings, because of the lack of transcribers. The records are later typed out and have to be proofread by the judges, causing inordinate delays. The State party also refers to the costs involved in preparing the court documents.

5.2 The State party further points out that crime has increased and the number of cases to be decided by the courts have multiplied. Because of the difficult economic situation in the country, it has not been possible to ensure equipment and services in order to expedite the disposal of cases. The State party submits that it is trying to improve the situation and that it has recently acquired nine computers and expects to get 40 more.

5.3 The State party concludes that the delays suffered by the author in the determination of his case are inevitable because of the situation explained above. The State party further submits that there has been no violation of article 14, paragraph 5, in the instant case, since the author's appeal was heard by the Supreme Court, be it with delay.

5.4 As regards the author's claim that the imposition of the death sentence was disproportionate since no one was killed or wounded during the robbery, the State party submits that the author's conviction was in accordance with Zambian law. The State party explains that armed robberies are prevalent in Zambia and that victims go through a traumatic experience. For that reason, the State party sees aggravated robbery involving the use of a firearm as a serious offence, whether or not a person is injured or killed. Finally, the State party submits that the author's sentence was pronounced by the competent courts.

5.5 Furthermore, the State party points out that under articles 59 and 60 of the Constitution, the President of the Republic of Zambia can exercise the prerogative of mercy. The author's case has been submitted and a decision is awaited. The State party further states that the delay in the hearing of the appeal and the fact that no one was injured in the attack are taken into account by the Advisory Committee on the exercise of the prerogative of mercy.

5.6 With regard to the author's claim that he was tortured by the police in order to force him to give a statement, the State party submits that torture is prohibited under Zambian law. Any victim of torture by the police can seek redress under both the criminal and civil legal systems. In this case, the author did not make use of any of those possibilities, and the State party suggests that, had the author's allegations been true, his counsel at the trial would have certainly advised him to do so.

5.7 The State party further explains that, if during trial an accused alleges that he was tortured by the police in order to extract a confession, the Court is obliged to conduct a "trial within a trial" to determine whether the confession was given voluntarily or not. In the author's case, such a trial within a trial was held, but it appeared from the testimonies given that the accused claimed that they were merely ordered to sign a statement without having

made a confession. The Court then continued with the main trial, and the question of whether the author made a statement or not was decided upon the basis of all the evidence at the end of the trial. It appears from the trial transcript that the judge concluded that the author had not been assaulted. He based his conclusion on the fact that the investigating magistrate, before whom the author and his co-accused appeared on 8 February 1980, had not recorded any injuries or marks of beating nor had the author complained to him about maltreatment; he further took into account discrepancies in the author's testimony as well as evidence led by the police officers that the accused had been cooperative. There was no record of the author having been medically treated for injuries which might have been caused by maltreatment.

5.8 Finally, the State party confirms that, pursuant to the Committee's request, the appropriate authorities have been instructed not to carry out the death sentence against the author while his case is before the Committee.

6. In his comments on the State party's submission, the author explains that he first appeared before a judge on 4 July 1981, and that the trial was then adjourned several times because the prosecution was not ready. At the end of July 1981, the case was transferred to another judge, who did not proceed with it; only on 22 September 1982, again before a different judge, did the trial actually start.

Issues and proceedings before the Committee

7.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes that the author was convicted and sentenced to death under a law that provides for the imposition of the death penalty for aggravated robbery in which firearms are used. The issue that must accordingly be decided is whether the sentence in the instant case is compatible with article 6, paragraph 2, of the Covenant, which allows for the imposition of the death penalty only "for the most serious crimes". Considering that in this case use of firearms did not produce the death or wounding of any person and that the court could not under the law take those elements into account in imposing sentence, the Committee is of the view that the mandatory imposition of the death sentence under those circumstances violates article 6, paragraph 2, of the Covenant.

7.3 The Committee has noted the State party's explanations concerning the delay in the trial proceedings against the author. The Committee acknowledges the difficult economic situation of the State party, but wishes to emphasize that the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe. Article 14, paragraph 3 (c), states that all accused shall be entitled to be tried without delay, and that requirement applies equally to the right of review of conviction and sentence guaranteed by article 14, paragraph 5. The Committee considers that the period of eight years between the author's arrest in February 1980 and the final decision of the Supreme Court, dismissing his appeal, in February 1988, is incompatible with the requirements of article 14, paragraph 3 (c).

7.4 As regards the author's claim that he was heavily beaten and tortured upon arrest, the Committee notes that that allegation was before the judge who rejected it on the basis of the evidence. The Committee considers that the

information before it is not sufficient to establish a violation of article 7 in the author's case.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 6, paragraph 2, and 14, paragraph 3 (c), of the International Covenant on Civil and Political Rights.

9. The Committee is of the view that Mr. Lubuto is entitled, under article 2, paragraph 3 (a), of the Covenant, to an appropriate and effective remedy, entailing a commutation of sentence. The State party is under an obligation to take appropriate measures to ensure that similar violations do not occur in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Appendix

[Original: English]

Individual opinion of Committee member Nisuke Ando

I do not oppose the Committee's views in the present case. However, with respect to the statement in the views that "use of firearms did not produce the death or wounding of any person", I would like to add the following:

Certain categories of acts are classified as "crimes" because they create a grave danger which may result in death or irreparable harm to many and unspecified persons. Such crimes include bombing of busy quarters, destruction of reservoirs, poisoning of drinking water, gassing in subway stations and probably espionage in wartime. In my view, the imposition of the severest punishment, including the death penalty where applicable, could be justified against those crimes, even if they do not result for one reason or another in the death of or injury to any person.

(Signed) Nisuke Ando

C. Communications Nos. 422-424/1990, Aduayom et al. v. Togo (views adopted on 12 July 1996, fifty-seventh session)*

Submitted by: Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou

Victims: The authors

State party: Togo

Dates of communications: 31 July 1990, 31 July 1990 and 1 August 1990, respectively (initial submissions)

Date of decision on admissibility: 30 June 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 12 July 1996,

Having concluded its consideration of communications Nos. 422/1990, 423/1990 and 424/1990, submitted to the Human Rights Committee by Messrs Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communications and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The authors of the communications are Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou, three Togolese citizens currently residing in Lomé. The authors claim to be victims of violations by Togo of articles 9 and 19 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Togo on 30 June 1988.

The facts as submitted by the authors

2.1 The author of communication No. 422/1990, Mr. Aduayom, is a teacher at the University of Benin (Togo) in Lomé. He states that he was arrested on 18 September 1985 by the police in Lomé and transferred to a Lomé penitentiary on 25 September 1985. He was charged with the offence of lèse-majesté (outrage au Chef de l'Etat dans l'exercice de sa fonction), and criminal proceedings were instituted against him. However, on 23 April 1986, the charges against him were dropped and he was released. Thereafter, he unsuccessfully requested his reinstatement in the post of maître assistant at the University, which he had held prior to his arrest.

2.2 The author of communication No. 423/1990, Mr. Diasso, also was a teacher at the University of Benin. He was arrested on 17 December 1985 by agents of the Togolese gendarmerie nationale, allegedly on the ground that he was in possession of pamphlets criticizing the living conditions of foreign students in Togo and suggesting that money "wasted" on political propaganda would be better spent on improving the living conditions in, and the equipment of, Togolese

* The text of an individual opinion of one Committee member is appended.

universities. He was taken to a Lomé prison on 29 January 1986. He was also charged with the offence of lèse-majesté, but the Ministry, after conceding that the charges against him were unfounded, released him on 2 July 1986. Thereafter, he has unsuccessfully sought reinstatement in his former post of adjunct professor of economics at the University.

2.3 The author of case No. 424/1990, Mr. Dobou, was an inspector in the Ministry of Post and Telecommunications. He was arrested on 30 September 1985 and transferred to a Lomé prison on 4 October 1985, allegedly because he had been found reading a document outlining in draft form the statutes of a new political party. He was charged with the offence of lèse-majesté. On 23 April 1986, however, the charges were dropped and the author was released. Subsequently, he unsuccessfully requested reinstatement in his former post.

2.4 The authors' wages were suspended under administrative procedures after their arrest, on the ground that they had unjustifiably deserted their posts.

2.5 With respect to the requirement of exhaustion of domestic remedies, the authors state that they submitted their respective cases to the National Commission on Human Rights, an organ they claim was established for the purpose of investigating claims of human rights violations. The Commission, however, did not examine their complaints and simply forwarded their files to the Administrative Chamber of the Court of Appeal, which, apparently, has not seen fit to examine their cases. The author of case No. 424/1990 additionally complains about the delays in the procedure before the Court of Appeal; thus, he was sent documents submitted by the Ministry of Post and Telecommunications some seven months after their receipt by the Court.

The complaint

3.1 The authors claim that both their arrest and their detention was contrary to article 9, paragraph 1, of the Covenant. That was implicitly conceded by the State party when it dropped all the charges against them. They further contend that the State party has violated article 19 in respect to them, because they were persecuted for having carried, read or disseminated documents that contained no more than an assessment of Togolese politics, either at the domestic or foreign policy level.

3.2 The authors request reinstatement in the posts they had held prior to their arrest, and request compensation under article 9, paragraph 5, of the Covenant.

The State party's observations on admissibility and the authors' comments and clarifications

4.1 The State party objects to the admissibility of the communications on the ground that the authors have failed to exhaust available domestic remedies. It observes that the procedure is regularly engaged before the Court of Appeal. In the cases concerning Messrs Aduayom and Diasso, the employer (the University of Benin) did not file its own submission, so that the Administrative Chamber of the Court of Appeal cannot pass sentence. With respect to the case of Mr. Dobou, the author allegedly did not comment on the statement of the Ministry of Post and Telecommunications. The State party concludes that domestic remedies have not been exhausted, since the Administrative Chamber has not handed down a decision.

4.2 The State party also notes that the Amnesty Law of 11 April 1991 decreed by the President of the Republic constitutes another remedy for the authors. The

law covers all political cases as defined by the Criminal Code ("infractions à caractère ou d'inspiration politique, prévues par la législation pénale") which occurred before 11 April 1991. Article 2 of the Amnesty Law expressly allows for reinstatement in public or private office. Amnesty is granted by the Public Prosecutor ("Procureur de la République ou juge chargé du Ministère Public") within three days after the request (article 4). According to article 3, the petition under these provisions does not prevent the victim from pursuing his claims before the ordinary tribunals.

5.1 After a request for further clarifications formulated by the Committee during its forty-ninth (1993) session, the authors, by letters dated 23 December, 15 November and 16 December 1993, respectively, informed the Committee that they were reinstated in their posts pursuant to the Law of 11 April 1991. Mr. Diasso notes that he was reinstated with effect from 27 May 1991, the others with effect from 1 July 1991.

5.2 The authors note that there has been no progress in the proceedings before the Administrative Chamber of the Court of Appeal and that their cases appear to have been shelved, after their reinstatement under the Amnesty Law. They argue, however, that the law was improperly applied to their cases, since they had never been tried and convicted for committing an offence but had been unlawfully arrested, detained and subsequently released after the charges against them were dropped. They add that they have not been paid arrears on their salaries for the period between arrest and reinstatement, during which they were denied their income.

5.3 As regards the statute of the University of Benin, the authors submit that, although the University is, at least in theory, administratively and financially autonomous, it is in practice under the control of the State, as 95 per cent of its budget is state-controlled.

5.4 The authors refute the State party's argument that they have failed to exhaust domestic remedies. In this context, they argue that the proceedings before the Administrative Chamber of the Court of Appeal are wholly ineffective, since their cases were obviously filed after their reinstatement under the Amnesty Law, and nothing has happened since. They do not, however, indicate whether they have filed complaints with a view to recovering their salary arrears.

The Committee's admissibility decision

6.1 The Committee considered the admissibility of the communication during its fifty-first session. It noted with concern that no reply had been received from the State party in respect of a request for clarification on the issue of exhaustion of domestic remedies, which had been addressed to it on 26 October 1993.

6.2 The Committee noted the authors' claims under article 9 and observed that their arrest and detention occurred prior to the entry into force of the Optional Protocol for Togo (30 June 1988). It further noted that the alleged violations had continuing effects after the entry into force of the Optional Protocol for Togo, in that the authors were denied reinstatement in their posts until 27 May and 1 July 1991, respectively, and that no payment of salary arrears or other forms of compensation had been effected. The Committee considered that those continuing effects could be seen as an affirmation of the previous violations allegedly committed by the State party. It therefore concluded that it was not precluded ratione temporis from examining the

communications and considered that they might raise issues under article 9, paragraph 5, article 19 and article 25 (c), of the Covenant.

6.3 The Committee took note of the State party's argument that domestic remedies had not been exhausted, as well as of the authors' contention that the procedure before the Administrative Chamber of the Court of Appeal was ineffective, because no progress in the adjudication of their cases was made after their reinstatement under the Amnesty Law, and that indeed said cases appeared to have been filed. On the basis of the information before it, the Committee did not consider that an application to the Administrative Chamber of the Court of Appeal constituted an available and effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 On 30 June 1994, therefore, the Committee declared the communication admissible inasmuch as it appeared to raise issues under article 9, paragraph 5, article 19 and article 25 (c), of the Covenant. It further decided, pursuant to rule 88, paragraph 2, of its rules of procedure, to deal jointly with the authors' communications.

Examination of the merits

7.1 The deadline for the submission of the State party's observations under article 4, paragraph 2, of the Optional Protocol expired on 10 February 1995. No submission has been received from the State party, in spite of a reminder addressed to it on 26 October 1995. The Committee regrets the absence of cooperation on the part of the State party as far as the merits of the authors' claims are concerned. It is implicit in article 4, paragraph 2, of the Optional Protocol that a State party must furnish the Committee, in good faith and within the imparted deadlines, with all the information at its disposal. This the State party has failed to do; in the circumstances, due weight must be given to the authors' allegations, to the extent that they have been adequately substantiated.

7.2 Accordingly, the Committee has considered the present communications in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.3 The authors contend that they have not been compensated for the time they were arbitrarily arrested, contrary to article 9, paragraph 5, of the Covenant. The procedures they initiated before the Administrative Chamber of the Court of Appeal have not, on the basis of the information available to the Committee, resulted in any judgement or decision, be it favourable or unfavourable to the authors. In the circumstances, the Committee sees no reason to go back on its admissibility decision, in which it had held that recourse to the Administrative Chamber of the Court of Appeal did not constitute an available and effective remedy. As to whether it is precluded ratione temporis from considering the authors' claim under article 9, paragraph 1, the Committee wishes to note that its jurisprudence has been not to entertain claims under the Optional Protocol based on events which occurred after the entry into force of the Covenant but before the entry into force of the Optional Protocol for the State party. Some of the members feel that the jurisprudence of the Committee on this issue may be questionable and may have to be reconsidered in an appropriate (future) case. In the instant case, however, the Committee does not find any elements which would allow it to make a finding under the Optional Protocol on the lawfulness of the authors' arrests, since the arrests took place in September and December 1985, respectively, and the authors were released in April and July 1986, respectively, prior to the entry into force of the Optional Protocol

for Togo on 30 June 1988. Accordingly, the Committee is precluded ratione temporis from examining the claim under article 9, paragraph 5.

7.4 In respect of the claim under article 19 of the Covenant, the Committee observes that it has remained uncontested that the authors were first prosecuted and later not reinstated in their posts, between 1986 and 1991, inter alia, for having read and, respectively, disseminated information and material critical of the Togolese Government in power and of the system of governance prevailing in Togo. The Committee observes that freedom of information and of expression are cornerstones of any free and democratic society. It is of the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power and that they may criticize or openly and publicly evaluate their governments without fear of interference or punishment, within the limits set by article 19, paragraph 3. On the basis of the information before the Committee, it appears that the authors were not reinstated in the posts they had occupied prior to their arrest because of such activities. The State party implicitly supports this conclusion by qualifying the authors' activities as "political offences", which came within the scope of application of the Amnesty Law of 11 April 1991; there is no indication that the authors' activities represented a threat to the rights and the reputation of others, or to national security or public order (article 19, paragraph 3). In the circumstances, the Committee concludes that there has been a violation of article 19 of the Covenant.

7.5 The Committee recalls that the authors were all suspended from their posts for a period of well over five years for activities considered contrary to the interests of the Government; in this context, it notes that Mr. Dobou was a civil servant, whereas Messrs Aduayom and Diasso, were employees of the University of Benin, which is in practice state-controlled. As far as the case of Mr. Dobou is concerned, the Committee observes that access to public service on general terms of equality encompasses a duty, for the State, to ensure that there is no discrimination on the ground of political opinion or expression. This applies a fortiori to those who hold positions in the public service. The rights enshrined in article 25 should also be read to encompass freedom to engage in political activity individually or through political parties, to debate public affairs, to criticize the Government and to publish material with political content.

7.6 The Committee notes that the authors were suspended from their posts for alleged "desertion" of the same, after having been arrested for activities deemed to be contrary to the interests of the State party's Government. Mr. Dobou was a civil servant, whereas Messrs Aduayom and Diasso were employees of the University of Benin, which is in practice state-controlled. In the circumstances of the authors' respective cases, an issue under article 25 (c) arises insofar as the authors' inability to recover their posts between 30 June 1988 and 27 May and 1 July 1991, respectively, is concerned. In this context, the Committee notes that the non-payment of salary arrears to the authors is a consequence of their non-reinstatement in the posts they had previously occupied. The Committee concludes that there has been a violation of article 25 (c) in the authors' case for the period from 30 June 1988 to 27 May and to 1 July 1991, respectively.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Togo of articles 19 and 25 (c) of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the authors are entitled to an appropriate remedy, which should include compensation determined on the basis of a sum equivalent to the salary which they would have received during the period of non-reinstatement starting from 30 June 1988. The State party is under an obligation to ensure that similar violations do not occur in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its views.

[Adopted in English, French and Spanish, the English text being the original version.]

Appendix

[Original: English]

Individual opinion of Committee member Fausto Pocar

While I concur with the Committee's findings on the issues raised by the authors' claims under articles 19 and 25 (c), I cannot subscribe to the Committee's conclusions on issues raised under article 9, paragraph 5, of the Covenant. On this issue, the Committee argues that since it is precluded ratione temporis from establishing the lawfulness of the authors' arrest and detention under article 9, paragraph 1, of the Covenant, it is also precluded ratione temporis from examining their claim to compensation under article 9, paragraph 5.I cannot share these conclusions, for the following reasons.

First, it is my personal view that the claim under article 9, paragraph 1, could have been considered by the Committee even if the alleged facts occurred prior to the entry into force of the Optional Protocol for Togo. As I had the opportunity to indicate with regard to other communications, and in more general terms when the Committee discussed its general comment on reservations (see CCPR/C/SR.1369, para. 31), the Optional Protocol provides for a procedure which enables the Committee to monitor the implementation of the obligations assumed by States parties to the Covenant, but it has no substantive impact on the obligations as such, which must be observed as from the entry into force of the Covenant. In other words, it enables the Committee to consider violations of such obligations not only within the reporting procedure established under article 40 of the Covenant, but also in the context of the consideration of individual communications. From the merely procedural nature of the Optional Protocol it follows that, unless a reservation is entered by a State party upon accession to the Protocol, the Committee's competence also extends to events that occurred before the entry into force of the Optional Protocol for that State, provided such events occurred or continued to have effects after the entry into force of the Covenant.

But even assuming, as the majority view does, that the Committee was precluded ratione temporis from considering the authors' claim under article 9, paragraph 1, of the Covenant, it would still be incorrect to conclude that it is equally precluded, ratione temporis, from examining their claim under article 9, paragraph 5. Although the right to compensation, to which any person unlawfully arrested or detained is entitled, may also be construed as a specification of the remedy within the meaning of article 2, paragraph 3, i.e. the remedy for the violation of the right set forth in article 9, paragraph 1, the Covenant does not establish a causal link between the two provisions contained in article 9. Rather, the wording of article 9, paragraph 5, suggests that its applicability does not depend on a finding of violation of article 9, paragraph 1; indeed, the unlawfulness of an arrest or detention may derive not only from a violation of the provisions of the Covenant, but also from a violation of a provision of domestic law. In the latter case, the right to compensation may exist independently of whether the arrest or detention can be regarded as the basis for a claim under article 9, paragraph 1, provided that it is unlawful under domestic law. In other words, for the purpose of the application of article 9, paragraph 5, the Committee is not precluded from considering the unlawfulness of an arrest or detention, even if it might be precluded from examining it under other provisions of the Covenant. This also applies when the impossibility of invoking other provisions is due to the fact that arrest or detention occurred prior to the entry into force of the Covenant or, following the majority view,

prior to the entry into force of the Optional Protocol. Since in the present case the unlawfulness of the authors' arrest and detention under domestic law is undisputed, I conclude that their right to compensation under article 9, paragraph 5, of the Covenant has been violated, and that the Committee should have made a finding to this effect.

(Signed) Fausto Pocar

D. Communication No. 434/1990, Lal Seerattan v. Trinidad and Tobago (views adopted on 26 October 1995, fifty-fifth session)

Submitted by: Lal Seerattan [represented by counsel]

Victim: The author

State party: Trinidad and Tobago

Date of communication: 17 December 1990 (initial submission)

Date of decision on admissibility: 17 March 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 October 1995,

Having concluded its consideration of communication No. 434/1990, submitted to the Human Rights Committee by Mr. Lal Seerattan under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Lal Seerattan, a Trinidadian citizen currently detained at the State prison in Port-of-Spain. He claims to be a victim of violations by Trinidad and Tobago of article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as presented by the author

2.1 The author states that on 27 December 1982 he was arrested and taken into custody in connection with the murder, on 26 December 1982, of Motie Ramoutar; on 28 December 1982, he was charged with the murder. The author further states that on 29 August 1983, after the preliminary examination which lasted eight months, the murder charge was reduced to manslaughter by the examining magistrate and he was released on bail. On 18 September 1984, he was rearrested and brought to trial on a murder charge. He was tried in the High Court of Port-of-Spain between 6 and 11 March 1986, was found guilty as charged and sentenced to death.

2.2 The prosecution relied mainly on evidence given by the son and the wife of the deceased. The deceased's son testified that when he and his parents returned home at about 7 p.m. on 26 December 1982, his father's employee, one B., was standing in front of the author's house; he was apparently drunk and was shouting threats at the author and his family. When his father sought to pacify B., the author's wife came out and told his father that he was responsible for B.'s misbehaviour. The deceased's son further testified that he then saw the author running out of the house, holding a harpoon-like piece of iron and chasing his father, whose escape was blocked by a fence. The author stabbed his father several times and then ran away. His evidence was in essence corroborated by his mother.

2.3 The pathologist testified that the injuries of which the deceased died could have been inflicted with the weapon that had been described by the eyewitnesses.

2.4 The author gave sworn testimony and indicated that he was relying on a cautioned statement which he had given to the police on 27 December 1982. In that statement the author had said that B. and one J., who had also been present at the locus in quo, had thrown stones at his house, that B. had threatened him and that he had asked the deceased to take B. home. The deceased had then tried to pacify B.. When B. and the deceased had started to fight, he and his family had left and had spent the night at the house of one S.P.. He further testified that relations between himself and the deceased and his family had always been cordial.

2.5 The author's wife, who testified on his behalf, gave a different version of the incident. She stated that B. and the deceased had insulted her and that the deceased and his family had thrown stones, after which she and her husband had left. She denied that her husband had been out in the street that night, as she had said in her earlier statement to the police. In light of her evidence, the judge also put the issue of provocation to the jury. Another witness appeared on the author's behalf, but his testimony was of no particular significance to the case, as he had only heard the voice outside and could not say who were the persons involved.

2.6 The Court of Appeal of Trinidad and Tobago dismissed the author's appeal on 9 March 1987. His petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 26 May 1988. On 3 December 1992, a warrant for the execution of the author on 8 December 1992 was issued. On 7 December 1992, attorneys in Trinidad and Tobago filed a constitutional motion on behalf of the author, mainly on the ground that executing the author after such prolonged delay would violate his constitutional rights. The author was given a stay of execution pending the outcome of a constitutional motion in another case which concerned the same issue.

2.7 On 4 January 1994, the author was informed that his death sentence had been commuted to life imprisonment by order of the President of Trinidad and Tobago, as a result of the findings of the Judicial Committee of the Privy Council in the case of Earl Pratt and Ivan Morgan v. the Attorney-General of Jamaica.[a]

The complaint

3.1 The author claims that his attorney did not represent him adequately and that, as a result, his trial was unfair.[b] He states that he had wanted to admit the crime and defend himself by invoking legitimate self-defence on account of three full years of provocation that preceded the crime in which the deceased and his family had, among other things, beaten his daughter. He points out that, by pleading guilty to manslaughter at the preliminary hearing, he had already admitted the crime but that at the trial his attorney "took him off the scene" by basing the defence on alibi. He complains that his attorney never challenged the absence of forensic evidence before the High Court, that he did not verify what his wife had previously said to the police and that he did not raise any objections against the absence of the photographer, who had taken pictures of the locus in quo.[c] The author further complains that his attorney simply abandoned the appeal, as he did not argue any grounds of appeal on his behalf.[d] In this context, the author adds that despite this, "he (the attorney) still had the guts to tell the Chief Justice that I am already in prison and if

he (the Chief Justice) could give me a five-year prison term because my case was really one of provocation".

3.2 Counsel submits that there are several factors in the author's case which give reason to believe that he did not receive a fair trial. With regard to the absence of scientific evidence at the trial, counsel concedes that it is open for the defence to comment on the absence of such evidence in order to undermine the prosecution case but that the defence would normally not demand that it be produced. The absence of scientific or other evidence was, however, of particular importance in the author's case, since the prosecution's case rested entirely upon the identification of the author by the deceased's son and wife in conditions of partial darkness and when one of those witnesses, namely, the wife of the deceased, had poor eyesight and was not wearing her glasses. Furthermore, given the witnesses' close relationship to the deceased and the history of bad relations between the two families, there was ample reason to question the reliability of the witnesses. Counsel further submits that in those circumstances the judge ought to have warned the jury to be cautious. Instead, the judge said: "I do not think [...] that you would have any difficulty in the identification of the people involved." According to counsel, that amounted to a misdirection which resulted in an unfair trial.

3.3 Counsel further points out that crucial witnesses in the case, like B., J. and S.P., were not called to court to testify and that there was a delay of more than three years between the author's arrest and the trial. He submits that such a delay is particularly undesirable in cases in which identification by witnesses is the main issue. The above is said to amount to violations of article 14 of the Covenant.

The State party's observations on admissibility

4. By submission of 10 September 1993, the State party confirms that the author has exhausted all domestic remedies in his criminal case.

The Committee's admissibility decision

5.1 The Committee considered the admissibility of the communication during its fiftieth session.

5.2 The Committee considered inadmissible the author's claims relating to the evaluation of evidence and to the instructions given by the judge to the jury. The Committee recalled that it is in principle for the appellate courts of States parties to the Covenant, and not for the Committee, to evaluate facts and evidence in a particular case or to review specific instructions to the jury by the judge, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice or that the judge manifestly violated his obligation of impartiality. The material before the Committee did not show that the trial judge's instructions or the conduct of the trial suffered from such defects.

5.3 The Committee further considered that the author and his counsel had failed to substantiate, for purposes of admissibility, the contention that the author was not adequately represented during the trial and on appeal, and that his trial was unfair because crucial witnesses in the case were not called to testify in court.

5.4 The Committee considered that the period between the author's initial arrest, on 27 December 1982, and his conviction on 11 March 1986, might raise an

issue under article 14, paragraph 3 (c), of the Covenant, which should be considered on the merits.

5.5 Consequently, on 17 March 1994, the Human Rights Committee declared the communication admissible in as much as it appeared to raise issues under article 14, paragraph 3 (c), of the Covenant.

Further information received from the State party

6. The State party, by submission of 19 April 1995, confirms that the author's sentence has been commuted, on 31 December 1993, to life imprisonment.

Issues and proceedings before the Committee

7.1 The Committee has considered the communication in the light of all the information provided by the parties. It notes with concern that, following the transmittal of the Committee's decision on admissibility, the State party has limited itself to informing the Committee about the commutation of the author's death sentence and that no information has been received from the State party clarifying the matter raised by the present communication. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party examine in good faith all the allegations brought against it and that it provide the Committee with all the information at its disposal. In the light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations.

7.2 The Committee notes that the information before it shows that the author was arrested on 27 December 1982, that he was released on bail on 29 August 1983 after the preliminary examination of the case had been concluded, that he was rearrested on 18 September 1984, that the trial against him commenced on 6 March 1986 and that he was convicted and sentenced to death on 11 March 1986. Although it is not clear from the material before the Committee whether there were one or two preliminary enquiries, or whether the original committal was for manslaughter or murder, the Committee considers that, in the circumstances of the instant case, the period of over three years between the author's initial arrest and the trial against him does, in the absence of any explanations from the State party justifying the delay, amount to a violation of article 14, paragraph 3 (c), of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 3 (c), of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Seerattan with an effective remedy. The Committee has noted that the State party has commuted the author's death sentence and recommends that, in view of the fact that the author has spent over 10 years in prison, of which seven years and nine months have been spent on death row, the State party consider the author's early release. The State party is under an obligation to ensure that similar violations do not occur in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all

individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] Privy Council Appeal No. 10 of 1993; judgement delivered on 2 November 1993.

[b] The author was represented by the same attorney at all stages of the judicial proceedings against him, i.e. preliminary hearing, trial and appeal to the Court of Appeal.

[c] It appears from the notes of evidence of the trial that the photographer had left the country and that the author's attorney made an application to visit the locus in quo. The prosecution objected because the author's house had burned down after the incident. The application was then withdrawn.

[d] It appears from the written judgement of the Court of Appeal that the attorney admitted before the Court of Appeal that, having examined the evidence in the case as well as the judge's summing-up to the jury, he could find no ground to argue on his client's behalf. The Court of Appeal agreed with the attorney but stated that "for the record we should deal briefly with the facts of the case".

E. Communication No. 454/1991, Enrique García Pons v. Spain (views adopted on 30 October 1995, fifty-fifth session)

Submitted by: Enrique García Pons

Alleged victim: The author

State party: Spain

Date of communication: 29 December 1990 (initial submission)

Date of decision on admissibility: 30 June 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 October 1995,

Having concluded its consideration of communication No. 454/1991, submitted to the Human Rights Committee by Mr. Enrique García Pons under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Enrique García Pons, a Spanish citizen born in 1951, currently residing in Badalona, Spain. He claims to be a victim of violations by Spain of article 14, paragraph 1, article 25 (c), and article 26 of the International Covenant on Civil and Political Rights.

The facts as submitted

2.1 The author is a civil servant, assigned to the sub-office of the National Employment Agency (Instituto Nacional de Empleo) in the municipality of Badalona. On 20 December 1986, he was appointed substitute for the District Judge of Badalona, a function which he performed until 16 October 1987; following his nomination, he requested his employer, the Ministry of Labour and Social Security, to formalize his change of status and to certify that he was, in terms of administrative status, assigned to "special services". The Ministry did not grant his request.

2.2 Later in 1987, the author was again appointed substitute District Judge of Badalona; he did not, however, assume his functions, since the post of District Judge had been taken up by a new judge. The author therefore requested unemployment benefits (prestaciones de desempleo). Again, he requested the formal recognition of his administrative status, but his employer did not process his request. The same situation prevailed in 1988; the author therefore filed a complaint with the competent administrative tribunal against the Instituto Nacional de Empleo, requesting unemployment benefits. On 27 May 1988, the Juzgado de lo Social No. 9 (Barcelona) rejected his request because the author was free to resume his former post and therefore did not satisfy the requirements under the unemployment benefits scheme. It was argued that what the author intended was to leave his post at the lower scale in order to claim unemployment benefits at a higher scale, while preparing his entrance into a judicial career.

2.3 On 11 May 1989, the Instituto Nacional de Empleo declared the author to be on "voluntary leave of absence" since the end of 1986. The author contested that decision and continued to assume, whenever called upon to do so, the functions of a substitute district judge. He argued that since all substitute judges contribute to unemployment benefit insurance, he himself should be able to benefit from its coverage. He appealed on those grounds against the decision of 27 May 1988 to the Tribunal Superior de Justicia de Cataluña which, on 30 April 1990, dismissed his appeal.

2.4 On 22 June 1990, the author filed an appeal (recurso de amparo) with the Constitutional Tribunal. On 21 September 1990, the Constitutional Tribunal rejected his complaint. The author re-petitioned the Constitutional Tribunal on 10 November 1990, pointing out that he was the only substitute judge in all of Spain to whom unemployment benefits had been denied and that that situation violated his constitutional rights. On 3 December 1990, the Constitutional Tribunal confirmed its earlier decision. With this, the author submits, available domestic remedies have been exhausted.

The complaint

3. The author alleges that he is a victim of denial of equality before the courts, as provided for in article 14 of the Covenant; of discrimination in access to public service, in violation of article 25 (c); and of discrimination because of denial of unemployment benefits, in contravention of article 26.

The State party's submission on admissibility

4. In a submission dated 17 September 1991, the State party stated that "the communication of Mr. García Pons satisfies, in principle, the conditions of admissibility set forth in articles 3 and 5, paragraph 2, of the Optional Protocol ... and that it is not incompatible with the provisions of the Covenant". While not objecting to the communication's admissibility, it indicated that it would, in due course, make submissions on the merits.

The Committee's admissibility decision

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee found that the author had substantiated his allegations, for purposes of admissibility, and was satisfied that the communication was not inadmissible under articles 1, 2, and 3 of the Optional Protocol. It further noted that the State party conceded that domestic remedies had been exhausted.

6. On 30 June 1994, the Human Rights Committee therefore decided that the communication was admissible inasmuch as it may raise issues under articles 14, 25 and 26 of the Covenant.

The State party's submissions on the merits

7.1 In its submissions of 13 February and 15 June 1995, the State party contests any violations of the Covenant. As to the facts of the case, the State party indicates that the author is not unemployed, but is a civil servant, and that although on several occasions he has been given leave to assume the post of a substitute judge, he has always been able to return to his established post; thus, he has never been unemployed and, accordingly, cannot qualify for

unemployment benefits. The author's submission suffers from the contradiction between his desire to be a judge on a permanent appointment and his unwillingness to give up the security of his status as civil servant in his current position.

7.2 As to the author's allegation that he is the only unemployed substitute judge who does not receive unemployment benefits, the State party states that the author has not cited a single example of a person in the same circumstances as himself, i.e. a civil servant on temporary leave from an established post, who has been treated differently. Only those unemployed substitute judges receive unemployment benefits who are, in fact, unemployed. This is not the author's situation. Nor can he expect the adoption of special legislation for himself to allow him to retain his civil service post while not performing its functions and, instead, preparing for competitive exams while receiving unemployment benefits on his expired substitute judge assignment.

7.3 With regard to an alleged violation of article 14 of the Covenant, the State party affirms that the author has had equal access to all Spanish courts, including the Constitutional Court, and that all of his complaints were examined fairly by the competent tribunals, as evidenced in the respective judgements and other submissions. Admittedly, the author disagrees with the disposition of his case, but he has not substantiated a claim that procedural guarantees were not observed by the various instances involved.

7.4 As to the alleged violation of article 25 of the Covenant, the State party points out that at no time in the many proceedings engaged in by the author did he invoke the right protected under article 25 of the Covenant. Moreover, that issue is not germane to the case, which focuses not on the right of equal access to public service but on the alleged denial of unemployment benefits.

The author's comments

8.1 In his comments, dated 29 March and 29 July 1995, the author reiterates his claim to be a victim of discrimination and contends that the relevant Spanish laws are incompatible with the Covenant, in particular the 1987 rules and circular 10/86 of the Under-Secretary in the Ministry of Justice concerning the status of substitute judges. He further alleges that the lack of permanence and the insecurity of substitute judges endangers the independence of the judiciary.

8.2 He rejects the State party's contention that he has primarily economic concerns and expects special legislation for himself. Far from having earned substantially more as a judge, he was compelled to return to his civil service post in order to attend to his minimum needs. He further stresses that, during various periods from 1986 to 1992, he served as a devoted substitute judge and paid unemployment insurance. He contends that the relevant legislation and practice should be adjusted to ensure that persons who pay unemployment insurance benefit therefrom when the terms of temporary employment end, notwithstanding the possibility of returning to another post in the civil service.

8.3 The author concludes that since he is the only substitute judge who does not receive unemployment benefits, he is a victim of discrimination within the meaning of article 26 of the Covenant.

Review of admissibility and examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 With regard to the author's allegations concerning article 25 (c) of the Covenant, the Committee notes that the State party has submitted that the author never invoked the substance of that right in any proceedings before Spanish tribunals; the author has not claimed that it would not have been open to him to invoke that right before the local courts. Therefore, pursuant to rule 93, paragraph 4, of the Committee's rules of procedure, the Committee sets aside that part of its admissibility decision concerning article 25 of the Covenant and declares it inadmissible because of non-exhaustion of domestic remedies.

9.3 Before addressing the merits in the case, the Committee observes that, although the right to social security is not protected, as such, in the International Covenant on Civil and Political Rights, issues under the Covenant may nonetheless arise if the principle of equality contained in articles 14 and 26 of the Covenant is violated.

9.4 In this context, the Committee reiterates its jurisprudence that not all differentiation in treatment can be deemed to be discriminatory under the relevant provisions of the Covenant.[4] A differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination.

9.5 The Committee notes that the author claims to be the only unemployed substitute judge who does not receive unemployment benefits. The information before the Committee reveals, however, that the relevant category of recipients of unemployment benefits encompasses only those unemployed substitute judges who cannot immediately return to another post upon termination of their temporary assignments. The author does not belong to that category, since he enjoys the status of a civil servant. In the Committee's opinion, a distinction between unemployed substitute judges who are not civil servants on leave and those who are cannot be deemed arbitrary or unreasonable. The Committee therefore concludes that the alleged differentiation in treatment does not entail a violation of the principle of equality and non-discrimination enunciated in article 26 of the Covenant.

9.6 With regard to the author's allegations concerning article 14, the Committee has carefully studied the various judicial proceedings engaged in by the author in Spain, as well as their disposition, and concludes that the evidence submitted does not support a finding that he has been denied a fair hearing within the meaning of article 14, paragraph 1, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, finds that the facts before it do not reveal a violation by Spain of any provision of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] See Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40), annex VIII.D, communication No. 182/1984 (Zwaan-de Vries v. the Netherlands), views adopted on 9 April 1987, para. 13; and ibid., Fiftieth Session, Supplement No. 40 (A/50/40), vol. II, annex X.K, communication No. 516/1992 (Simunek et al. v. the Czech Republic), views adopted on 19 July 1995, para. 11.5.

F. Communication No. 459/1991, Osbourne Wright and Eric Harvey v. Jamaica (views adopted on 27 October 1995, fifty-fifth session)

Submitted by: Osbourne Wright and Eric Harvey [represented by counsel]

Victims: The authors

State party: Jamaica

Date of communication: 27 February 1991 (initial submission)

Date of decision on admissibility: 17 March 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 October 1995,

Having concluded its consideration of communication No. 459/1991, submitted to the Human Rights Committee by Messrs Osbourne Wright and Eric Harvey under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, their counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The authors of the communication are Osbourne Wright and Eric Harvey, two Jamaican citizens at the time of submission awaiting execution at St. Catherine District Prison, Jamaica. They claim to be victims of a violation by Jamaica of articles 6, 7, 10 and 14 of the International Covenant on Civil and Political Rights. They are represented by counsel.

The facts as submitted

2.1 The authors were charged with the murder of Timothy Clarke in December 1980 and were committed for trial in October 1981. In July 1983, at the conclusion of their trial, the jury did not return a unanimous verdict and a retrial was ordered. The retrial took place in the Home Circuit Court of Kingston. On 29 April 1988, the authors were found guilty and sentenced to death. The Court of Appeal of Jamaica dismissed their appeals on 10 October 1988 and produced a written judgement on 15 November 1988. In February 1991, the Judicial Committee of the Privy Council dismissed the authors' petition for special leave to appeal. With that, it is submitted, domestic remedies have been exhausted.

2.2 At trial, the case for the prosecution was that the authors and one or two other men, on 2 November 1980, after having robbed a butcher of 20,000 Jamaican dollars, stopped a vehicle in the district of Pepper, parish of St. Elizabeth, under the pretext of needing help. They shot and wounded the driver, Stanville Beckford, and then shot and killed Timothy Clarke, a passenger, who was trying to escape. Mr. Beckford testified that, before losing consciousness, he saw Mr. Wright shooting Mr. Clarke. Kenneth White, who had been talking with the butcher prior to the robbery, identified Mr. Harvey as one of the participants. The butcher, a Mr. Francis, made dock identifications of both

Mr. Wright and Mr. Harvey as participants in the robbery. According to the testimony given by Detective Sergeant Ashman during the preliminary hearing, Mr. Wright, after his arrest on 2 November 1980, admitted the crime, indicated the hiding place of the murder weapon and directed the police to the addresses of his accomplices, Mr. Harvey and one Mr. Campbell. Money was found on both Mr. Wright and Mr. Harvey, in bundles of 200 Jamaican dollars. The butcher's watch was found on Mr. Harvey. At the time of the retrial, Detective Ashman had died, and his deposition was admitted as evidence.

2.3 The defence was based on alibi. Mr. Wright states that he was at his girlfriend's house all morning and that he only left her place in the afternoon to buy some vegetables and to deposit 500 Jamaican dollars in his mother's saving account. It was then that he was arrested. He denies having admitted his participation in the killing to the police. Mr. Harvey states that he is a fisherman and that he was at Old Harbour Bay, mending his fishing nets, on 2 November 1980 and that he did not know Mr. Wright or Mr. Campbell. He was arrested on 4 November 1980, when he was just about to go to sea. He denies having been in possession of the butcher's watch or of any watch similar to it.

The complaint

3.1 The authors claim that they did not have a fair trial. More particularly, they allege that the judge's summing-up was biased in favour of the prosecution. The judge allegedly did not give proper guidance to the jury on how to assess the evidential value of Detective Ashman's deposition, and failed to warn the jury of the dangers of the admissibility of the evidence contained in the deposition, particularly in the light of the inability of the defendants to subject the evidence to cross-examination. Detective Ashman gave his deposition at the preliminary hearing before the Gun Court in 1981. Although Mr. Harvey was represented by a lawyer, no lawyer was present for Mr. Wright and no effective cross-examination of Mr. Ashman's evidence took place during the preliminary hearing. The judge, in his summing-up, conveyed the impression that the authors' failure to cross-examine Mr. Ashman during the preliminary inquiry justified conclusions adverse to them, without taking into account the absence of a lawyer for Mr. Wright and the possible lack of instructions for Mr. Harvey's counsel. The judge further did not sufficiently explain the danger of dock identifications and did not properly draw the attention of the jury to irregularities during the identification parade held for Mr. Harvey. Mr. Harvey claims that he was identified by Mr. White only at a second identification parade, which was unfairly conducted since the witness was given an opportunity to see him before the parade was held. Mr. Harvey was further only identified by Mr. Beckford and Mr. Francis in dock identifications that took place more than seven years after the event; both witnesses had failed to identify him at the identification parade. Mr. Wright claims furthermore that Mr. Beckford's dock identification of him was fraught with dangers, since Mr. Beckford had employed Mr. Wright five years before and the employment had ended in disagreement. The failure of the judge to give proper instructions to the jury with regard to these issues is said to amount to a violation of article 14, paragraph 1, of the Covenant.

3.2 It is also alleged that the judge refused to allow the defence to call a witness to prove the contents of the police station diary, which contained important references that would test the credibility of Mr. Ashman's uncorroborated statement. It is submitted that the defence learned the identity of the police officer who made the entry in the diary only during the course of the trial, despite earlier efforts to obtain information at the police station. The defence therefore had no opportunity to have the police officer ready before

the commencement of the trial. The witness arrived after the defence had completed its case but before the judge had started his summing-up. The authors claim that there was therefore no reason for the judge to refuse to have the witness heard and to have the contents of the police diary put to the jury. It is stated that the judge's refusal to allow the witness to be heard violates article 14, paragraphs 1 and 3 (e), of the Covenant.

3.3 The authors further claim that article 14, paragraph 3 (c), has been violated in their case, since they were convicted some eight years after the incident. They contend that there is no reasonable excuse for that delay. The authors attach a schedule of the case history, which shows that a trial date was set on numerous occasions but was then postponed to a later date because of the absence of either accused, defence lawyers or witnesses. In this context, the authors note that Mr. Wright was released from custody on 23 February 1984, after having been acquitted on another charge. He did not volunteer to appear and was rearrested in the summer of 1986. The trial was not held immediately in 1986, but postponed until April 1988. The delay is said to be detrimental to the defence in view of the prosecution's reliance on dock identifications of the accused, made eight years after the incident took place. Also, in Mr. Wright's case, his main alibi witness, his then girlfriend, who gave evidence at the first trial, could no longer be found. Detective Ashman died between the two trials, and the evidence from his deposition could not, therefore, be subjected to cross-examination. In this context, counsel notes that, at the hearing before the Judicial Committee of the Privy Council, their Lordships stated that they were not in a position to comment on the inefficiency of the judicial machinery in Jamaica.

3.4 The authors also claim that their rights under article 14, paragraphs 3 (b) and (d) of the Covenant have been violated. They claim that they suffered from a lack of adequate legal representation throughout the entire judicial process in Jamaica. Mr. Harvey submits that he was represented by a privately retained lawyer during the first trial, but that he depended on legal aid for the retrial. He claims that the legal aid attorney who represented him did not take a statement from him and that he met him for the first time in April 1988, at the beginning of the trial. Mr. Wright depended on legal aid for the entire process; he was not represented at the preliminary hearing. It is submitted that the lack of preparation of the defence led to a failure to properly cross-examine the prosecution witnesses, to lack of communication between the authors and their lawyers and to the lack of attendance of witnesses for the defence. That is said to reflect the fundamental inadequacy of the Jamaican legal aid system. In this context, the authors note that during the retrial the judge criticized the defence on several occasions for not doing their work properly.

3.5 As regards the appeal, it is submitted that Mr. Wright was not informed about the date of the appeal hearing, that his lawyer did not consult him before the hearing and that he only learned about the appeal when his lawyer informed him that it had failed. Mr. Harvey states that he was informed by his lawyer, on 17 August 1988, that he was not able to represent him before the Court of Appeal. A second letter, dated 18 October 1988, informed him that his appeal was dismissed. It appeared that his lawyer had represented him at the hearing, despite his earlier statement that he would not, and had conceded that he could not support the appeal. It is argued that that left the authors without effective representation at the appeal, thereby violating their right to a fair trial.

3.6 The authors also claim that the length of their detention in deplorable circumstances constitutes a violation of the Covenant, notably of article 10,

paragraph 1. Reference is made to a report prepared by a non-governmental organization describing the conditions prevailing on death row in Jamaica. It is stated that the authors are given insufficient food of low nutritional value, that there is no access to recreational and sports facilities and that the authors spend an excessive amount of time locked up in cells. Mr. Wright submits that he fell ill and had to be taken to Spanish Town Hospital in March 1991.

The State party's submission on admissibility and the authors' comments thereon

4. By submission of 18 November 1991, the State party argued that the communication was inadmissible on the ground of failure to exhaust domestic remedies. It conceded that the authors had exhausted their criminal appeal possibilities, but argued that they had failed to pursue the remedy provided by the Jamaican Constitution. In this connection, the State party submitted that articles 6, 7 and 14 of the Covenant were coterminous with sections 14, 17 and 20 of the Constitution. Section 25 of the Constitution provides that any person who alleges that any of his basic rights have been violated may apply to the Supreme Court for redress.

5. In his comments on the State party's submission, counsel referred to the Committee's jurisprudence that, in the absence of legal aid, the constitutional motion is not a remedy that needs to be exhausted for purposes of admissibility of a communication under the Optional Protocol.

The Committee's admissibility decision

6.1 The Committee considered the admissibility of the communication at its fiftieth session.

6.2 With regard to the State party's claim that the communication was inadmissible on the ground of failure to exhaust domestic remedies, the Committee recalled its constant jurisprudence that for purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must be both effective and available. The Committee noted that the Supreme Court of Jamaica had, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in those cases had been dismissed. However, the Committee also recalled that the State party had indicated on several occasions[a] that no legal aid was made available for constitutional motions. The Committee considered that, in the absence of legal aid, a constitutional motion did not, in the circumstances of the instant case, constitute an available remedy which needed to be exhausted for purposes of the Optional Protocol. In this respect, the Committee therefore found that it was not precluded by article 5, paragraph 2 (b), from considering the communication.

6.3 The Committee considered inadmissible the part of the authors' claims which related to the instructions given by the judge to the jury with regard to the evaluation of the evidence and the value of the identifications. The Committee reiterated that it was in principle for the appellate courts of States parties, and not for the Committee, to review specific instructions to the jury by the judge, unless it was clear that the instructions were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligations of impartiality. The material before the Committee did not show that the judge's instructions to the jury in the instant case suffered from such defects.

6.4 The Committee considered that the alleged lack of legal representation for Mr. Wright at the preliminary hearing and the claim that counsel in fact

abandoned the appeal without prior consultation with the authors, as well as the delay of almost five years between the first trial and the retrial, might raise issues under article 14, paragraphs 3 (b), (c) and (d), of the Covenant, which should be examined on the merits.

6.5 The Committee considered inadmissible the authors' claim that their lengthy stay on death row, under allegedly deplorable circumstances, violated the Covenant, since the authors had failed to show what steps they had taken to bring the complaint to the attention of the authorities in Jamaica.

7. Accordingly, the Human Rights Committee decided that the communication was admissible insofar as it appeared to raise issues under article 14, paragraphs 3 (b), (c) and (d), of the Covenant. Under rule 86 of the Committee's rules of procedure, the State party was requested not to carry out the death sentence against the authors while their communication was under consideration by the Committee.

The State party's submission on the merits and the authors' comments

8.1 By submission of 7 November 1994, the State party states that it is making inquiries into Mr. Wright's allegation that he was not represented at the preliminary hearing. As regards the claim that the period of five years between the end of the first trial and the beginning of the retrial constitutes undue delay in violation of article 14, paragraph 3 (c), the State party argues that the delay was not wholly attributable to the State. In this context, the State party notes that the retrial was postponed on several occasions because of the absence of either defence counsel or the accused, and points out that Mr. Wright was at large for two years, during which period the retrial could not proceed.

8.2 With regard to the appeal, the State party submits that an examination of the Court of Appeal's records shows that counsel for Mr. Wright did in fact argue the appeal on his behalf. Moreover, the State party states that there is no indication that Mr. Wright ever signalled his dissatisfaction with his legal representation to the relevant authorities and that, in those circumstances, the State party cannot be held responsible for the alleged improper representation.

8.3 On 15 September 1995, the State party informs the Committee that the authors' sentences have been commuted to life imprisonment.

9.1 In his response to the State party's submission, Mr. Wright reiterates that his legal aid counsel was absent at the preliminary hearing and that the magistrate should either have adjourned the hearing or provided him with a new legal aid lawyer. As regards the delay in obtaining a retrial, Mr. Wright acknowledges that he was at large for two years, during which he could not be brought to trial. He submits, however, that that does not explain why the retrial against his co-defendant did not take place and why it took another two years after his rearrest to begin with the retrial. As regards the appeal, Mr. Wright states that he has never claimed that his counsel did not argue the appeal but only that he was not informed beforehand when the appeal was going to take place and therefore had no occasion to consult with his counsel.

9.2 Counsel for the authors, by submission of 3 April 1995, argues that, taking into account that the preliminary hearing took place 14 years ago, the State party will never be able to explain satisfactorily why the preliminary hearing proceeded in the absence of Mr. Wright's legal representative. In this context, counsel recalls that Mr. Wright was only 18 years old at the time and not familiar with the criminal process. At the hearing he failed to cross-examine

the prosecution witnesses, in particular Detective Ashman. The failure to cross-examine was held against the defence by the judge at the authors' retrial, when the opportunity to cross-examine Detective Ashman no longer existed. In this context, it is stated that Detective Ashman was cross-examined at the first trial but that no transcript of the first trial was available at the retrial. It is said that the information contained in the transcript might have helped to assess the value of the identification evidence and that the absence of the trial transcript seriously prejudiced the authors' defence.

9.3 It is further accepted that the State party cannot be held responsible for the two years' delay in the retrial for Mr. Wright while he was at large. However, counsel points out that the retrial was ordered in July 1983 and that Mr. Wright was released from custody in February 1984, and argues that there was no reason why the retrial could not have taken place before February 1984. Alternatively, after Mr. Wright's rearrest in early 1986, there was no reason why a trial date could not have been fixed immediately. Counsel argues that, as a consequence of the delay, the authors' defence was seriously prejudiced, since Detective Ashman's evidence could only be read and not cross-examined, dock identifications took place seven years after the event and Mr. Wright's main alibi witness was nowhere to be found.

9.4 As regards Mr. Harvey, counsel refers to his submissions made for Mr. Wright above and adds that there is no reason why Mr. Harvey could not have been tried even while Mr. Wright was at large. Counsel points out that, at the retrial, Mr. Harvey was identified in the dock by two of the witnesses seven years after the event, but that the same witnesses had been unable to identify him at an identification parade shortly after the incident. Further, at the retrial, the alibi witness called for Mr. Harvey could not exactly remember the date when he had been with Mr. Harvey, thereby weakening his evidence. It is submitted that, if the retrial had been held earlier, the witness' memory might have been clearer.

9.5 Counsel recalls that counsel for Mr. Harvey on appeal conceded that there were no merits to the appeal and argues that the factual abandonment of the appeal by Mr. Harvey's lawyer constitutes a violation of article 14, paragraphs 3 (b) and (d) of the Covenant.

Examination of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee notes that the State party has stated that it will investigate Mr. Wright's allegation about the lack of legal representation at the preliminary hearing but has not provided any further information. In the circumstances, the Committee considers that it is undisputed that Mr. Wright was not represented by counsel at the preliminary hearing of the charges against him. The Committee affirms that legal assistance must be made available to an accused who is charged with a capital crime. This applies not only to the trial and relevant appeals, but also to any preliminary hearings relating to the case. The Committee notes that there is no indication that the lack of representation at the preliminary hearing was attributable to Mr. Wright. The Committee finds therefore that the failure to make legal representation available to Mr. Wright at the preliminary hearing constitutes a violation of article 14, paragraph 3 (d), of the Covenant.

10.3 The Committee notes that the first trial against the authors ended on 29 July 1983 with a hung jury and that a retrial was ordered. It appears from the file that a trial date was set for 22 February 1984 and that the trial was postponed because the accused Wright was no longer in custody. Although Mr. Harvey remained available for trial and regular hearings were being held throughout and trial dates were set on several occasions, the retrial did not start until 26 April 1988, 22 months after Mr. Wright's rearrest. The Committee finds that, in the circumstances of the instant case, such a delay cannot be deemed compatible with the provisions of article 14, paragraph 3 (c), of the Covenant.

10.4 Mr. Wright has claimed that his counsel did not consult with him beforehand about the appeal and that that indicates that he was not effectively represented. The Committee notes that Mr. Wright was represented at the appeal by the lawyer who defended him at trial, and that counsel filed and argued several grounds of appeal, challenging several decisions made by the judge and questioning his directions to the jury. In these specific circumstances, the Committee finds that Mr. Wright's right to an effective representation on appeal has not been violated.

10.5 As regards Mr. Harvey's claim that he was not effectively represented on appeal, the Committee notes that the Court of Appeal judgement shows that Mr. Harvey's legal aid counsel for the appeal conceded at the hearing that there was no merit in the appeal. The Committee recalls that while article 14, paragraph 3 (d), of the Covenant does not entitle the accused to choose counsel provided to him free of charge, the Court should ensure that the conduct of the case by the lawyer is not incompatible with the interests of justice. While it is not for the Committee to question counsel's professional judgement, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed and given an opportunity to engage another counsel. The Committee is of the opinion that, in the instant case, Mr. Harvey should have been informed that his counsel was not going to argue any grounds in support of the appeal, so that he could have considered any remaining options open to him. In the circumstances, the Committee finds that Mr. Harvey was not effectively represented on appeal, in violation of article 14, paragraphs 3 (b) and (d).

10.6 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its general comment No. 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review [of conviction and sentence] by a higher tribunal".[b] In the present case, since the final sentence of death was passed without legal representation for Mr. Wright at the preliminary hearing, without due respect for the requirement that an accused be tried without undue delay, and without effective representation for Mr. Harvey on appeal, there has consequently also been a violation of article 6 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights,

is of the view that the facts before it disclose a violation of article 14, paragraph 3 (b), (c) and (d), and consequently of article 6, of the International Covenant on Civil and Political Rights.

12. The Committee is of the view that Osbourne Wright and Eric Harvey are entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy. The Committee is of the opinion that in the circumstances of the case, this entails their release. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] See, for example, Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.J, communication No. 283/1988 (Little v. Jamaica), views adopted on 1 November 1991; ibid., Forty-ninth Session, Supplement No. 40 (A/49/40), vol. II, annex IX.A, communication No. 321/1988 (Thomas v. Jamaica), views adopted on 19 October 1993; and ibid., annex IX.G, communication No. 352/1989 (Douglas, Gentles and Kerr v. Jamaica), views adopted on 19 October 1993.

[b] Ibid., Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, general comment No. 6 (16), para. 7.

G. Communication No. 461/1991, George Graham and Arthur Morrison v. Jamaica (views adopted on 25 March 1996, fifty-sixth session)*

Submitted by: George Graham and Arthur Morrison [represented by counsel]

Victims: The authors

State party: Jamaica

Date of communication: 18 March 1991 (initial submission)

Date of decision on admissibility: 12 October 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1996,

Having concluded its consideration of communication No. 461/1991, submitted to the Human Rights Committee by Messrs George Graham and Arthur Morrison under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, their counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The authors of the communication are George Graham and Arthur Morrison, two Jamaican citizens at the time of submission of the communication awaiting execution at St. Catherine District Prison, Jamaica. After the submission of the communication, Mr. Morrison died during an incident at St. Catherine District Prison, on 31 October 1993. Mr. Graham's sentence was commuted to life imprisonment on 29 May 1995. The authors claim to be the victims of violations by Jamaica of articles 6, 7 and 14, paragraphs 1, 3 and 5, of the International Covenant on Civil and Political Rights. They are represented by counsel.

The facts as submitted by the authors

2.1 The authors were jointly charged with the murder, on 8 May 1984, of one O. B. On 16 April 1986, after a trial lasting three days, they were found guilty as charged and sentenced to death in the Home Circuit Court of Kingston. The Court of Appeal of Jamaica dismissed their application for leave to appeal on 12 October 1987. On 13 December 1990, the Judicial Committee of the Privy Council dismissed their petition for special leave to appeal. With that, it is submitted, available domestic remedies have been exhausted. In December 1992, the authors' offence was classified as capital murder under section 7 of the Offences against the Person (Amendment) Act, 1992.

2.2 O. B. was shot in his parents' flat, in the presence of his parents and three sisters. The case against the authors rested on the evidence given by one of the victim's sisters, S. B., who identified the authors from the dock; no

* Pursuant to rule 85 of the rules of procedure, Committee member Laurel Francis did not take part in the adoption of the views.

identification parade was held. S. B. testified that on 8 May 1984, at about 7 p.m., five armed men had forced their way into the flat; among these men she recognized George Graham, whom she knew by his nickname "Money-man", and Arthur Morrison, whom she also knew. George Graham allegedly said "Don't shoot because baby is inside" and then tried to pull O. B. out of the flat. O. B. resisted and ran into an adjacent bedroom, where his father was. Then a group of about 15 men entered the flat, all of them armed, and Arthur Morrison allegedly said: "Mek we kill the boy". O. B. was shot twice in the head by two other men; his father did not identify any of them. S. B. further testified that, upon leaving, one of the men grabbed her sister's golden chain, but that another man ordered him to give it back since "they had not come to rob, but to kill".

2.3 The prosecution argued that, although the authors had not actually killed O. B., they were participants in a joint plan or conspiracy to murder him and were therefore guilty of murder on the basis of the doctrine of common design. The authors made an unsworn statement from the dock, claiming that they had been elsewhere at the time of the crime. At the close of the prosecution's case, Mr. Graham's legal representative made a submission of "no case to answer", which was dismissed by the judge. In her summing-up to the jury, the judge pointed out, inter alia, that it was not necessary to hold an identification parade when the eyewitness already knew the accused.

2.4 Throughout the judicial proceedings, the authors were represented by legal aid lawyers. It appears from the trial transcript that the attorneys assigned to the authors for the trial had previously appeared together for both authors and for two other accused persons. On the opening day of the trial, one of the attorneys indicated that they had subsequently divided the case and that he and junior counsel would represent Mr. Morrison and the third attorney would represent Mr. Graham; he further indicated that the attorney appearing for Mr. Graham could not be present that day and, upon request of the judge, agreed to hold for him. The next morning, before cross-examination of the first witness, it was announced that the first attorney would be representing Mr. Morrison and the second Mr. Graham. The third attorney apparently withdrew from the defence.

2.5 On appeal, the authors were represented by a different lawyer. Before the Court of Appeal, counsel stated that, after having carefully examined the evidence and the judge's summing-up, he could find no grounds of appeal to argue on his clients' behalf. After reviewing the case, the Court of Appeal agreed with counsel and dismissed the application for leave to appeal. It appears from the written judgement that the appeal was scheduled to be heard by the Court of Appeal on 26 May 1987 but that an application had been made to "take the matter out of the list for two weeks to obtain the services of senior counsel". It further appears that "five months later the situation had not altered" and that then the above-mentioned counsel had been assigned.

2.6 A London law firm represented the authors pro bono before the Judicial Committee of the Privy Council. The principal grounds for the authors' petitions for special leave to appeal to the Judicial Committee of the Privy Council were that the trial judge had misdirected the jury on the issue of identification and/or recognition evidence and on the issue of common design.

The complaint

3.1 In respect of article 14, paragraph 1, of the Covenant, the authors claim that the judge failed properly to direct the jury on issues relating to "common

design'. They further contend that the judge failed to warn the jury of the risk of errors in identification or recognition evidence.

3.2 As to the preparation and conduct of the defence at the trial, Mr. Morrison complained that the attorneys had never discussed the case with him or taken instructions prior to the trial. It is stated that neither Mr. Morrison nor Mr. Graham were consulted about the change of counsel which took place on the second day of the trial. Mr. Graham complains that he had only minimal opportunity to give subsequent instructions and that, in the circumstances, the conduct of his defence was deficient.

3.3 In respect of their appeal, both authors complain that their request to be represented by senior counsel was ignored and that counsel assigned to them for the purpose of the appeal was not of their own choosing. They argue that in an appeal against conviction and sentence involving the death penalty, the right to a fair trial includes the right to representation either by counsel of one's own choice or by counsel of sufficient seniority and experience to present such an appeal competently and carefully. The authors further claim that they were not informed that counsel had been assigned to them, that they never saw or spoke to him and that counsel abandoned the appeal without their consent. In this context, the authors add that they were denied the opportunity to defend themselves in person, as their request to be present at the hearing of the appeal was either ignored or refused. It is submitted that, because the authors were denied the right to representation of their choosing or to be present at the appeal, and counsel abandoned the appeal, they were also deprived of their right to an effective review of their conviction and sentence by the Court of Appeal.

3.4 Finally, the authors claim that the time spent on death row, together with the anxiety and mental stress suffered and being kept in the dark as to whether or not the authorities would continue their policy of suspending executions, amount to cruel, inhuman and degrading treatment in violation of article 7 of the Covenant. Moreover, the resumption of executions after such a period of suspension of executions unrelated to justifiable legal arguments is said to constitute a violation of article 6 of the Covenant.

The State party's submission on admissibility

4. In its submission of 11 February 1993, the State party argues that the communication is inadmissible on grounds of non-exhaustion of domestic remedies. It concedes that the authors have exhausted their criminal appeal possibilities but argues that they have failed to pursue the remedy provided for under the Jamaican Constitution. In this context, the State party submits that article 14, paragraphs 1, 3 (d) and 5, of the Covenant are coterminous with sections 20 and 110 of the Constitution. Section 25 of the Constitution provides that any person who alleges that any of his basic rights have been violated may apply to the Supreme Court for redress.

The Committee's admissibility decision

5.1 The Committee considered the admissibility of the communication at its fifty-second session.

5.2 The Committee noted the State party's contention that the communication was inadmissible on the ground of failure to exhaust domestic remedies, and it recalled its constant jurisprudence that for purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must be both

effective and available. The Committee noted that the Supreme Court of Jamaica had, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in those cases had been dismissed. However, the Committee also recalled that the State party had indicated on several occasions that no legal aid was made available for such purposes. The Committee considered that, in the absence of legal aid, a constitutional motion did not, in the circumstances of the case, constitute an available remedy which must be exhausted for purposes of the Optional Protocol. In this respect, therefore, the Committee found that it was not precluded by article 5, paragraph 2 (b), from considering the communication.

5.3 As to the authors' claims under articles 6 and 7 of the Covenant, the Committee, having noted that there were no further remedies available to the authors, considered that those allegations should be examined on the merits.

5.4 As to the authors' claim of unfair trial because of the trial judge's alleged failure properly to direct the jury on the issues of common design and identification evidence, the Committee reaffirmed that it was in principle for the appellate courts of States parties to the Covenant, and not for the Committee, to evaluate the facts and evidence in a particular case. Similarly, it was not for the Committee to review specific instructions to the jury by the judge unless it could be ascertained that those instructions were clearly arbitrary or amounted to a denial of justice, or that the judge had manifestly violated his obligation of impartiality. The material before the Committee did not show that the judge's instructions to the jury or the conduct of the trial suffered from such defects. That part of the communication was therefore inadmissible under article 3 of the Optional Protocol.

5.5 The Committee considered that the authors had failed to substantiate, for purposes of admissibility, their claim that the preparation and conduct of their defence at trial were inadequate. The information before the Committee revealed that Mr. Morrison was represented by the same attorney who had represented both him and Mr. Graham at the preliminary hearing, that Mr. Graham had raised no objections when it was decided that junior counsel would represent him and that no complaint was made to the trial judge by or on behalf of the authors that time or facilities to prepare their defence had been inadequate. Furthermore, the authors failed to indicate how their attorneys would have acted against their instructions, and there was no indication that Mr. Morrison's attorney or junior counsel representing Mr. Graham had acted negligently in the discharge of their professional duties. Accordingly, that part of the communication was inadmissible under article 2 of the Optional Protocol.

5.6 As to the authors' allegations about the preparation and conduct of their defence on appeal, and as to whether, in the circumstances, the authors should have been allowed to attend the hearing of their application for leave to appeal, the Committee considered that that might raise issues under article 14, paragraphs 1, 3 (b) and (d) and 5, of the Covenant; accordingly, those allegations should be examined on their merits.

5.7 Finally, the Committee noted from the information received from a third party that Mr. Morrison had died on 31 October 1993, almost one year before the adoption of the decision on admissibility, and it requested the State party to confirm that information and to clarify the circumstances surrounding Mr. Morrison's death.

6. Accordingly, the Human Rights Committee decided that the communication was admissible insofar as it might raise issues under articles 6, 7 and, in respect

of the conduct of the authors' appeal, article 14, paragraphs 1, 3 (b) and (d) and 5, of the Covenant. Under rule 86 of the Committee's rules of procedure, the State party was requested not to carry out the death sentence against Mr. Graham while the communication was under consideration by the Committee.

The State party's submission on the merits and counsel's comments

7.1 The State party, by submission of 27 July 1995, denies that there has been a violation of article 7 of the Covenant in the authors' case. In this connection, it refers to the Committee's decision in the case of Pratt and Morgan v. Jamaica, in which the Committee held that "prolonged judicial proceedings do not per se constitute cruel, inhuman or degrading treatment". In this context, the State party observes that it is not enough to assert that a long stay on death row constitutes cruel and inhuman treatment: the circumstances of a particular case must show specific factors which render the treatment cruel or inhuman.

7.2 The State party submits that the authors have failed to provide grounds for their allegation that article 6 of the Covenant has been violated in their case.

7.3 As regards the authors' representation on appeal, the State party states that the records of the Court of Appeal show that counsel who represented Mr. Morrison at trial confirmed, by letter of 30 April 1986, that he would represent the authors at the hearing of their appeal. By further letter of 27 May 1987, counsel requested that his name be removed from the list, as he had been informed that the authors were in the process of instructing senior counsel. By letter of 25 June 1987, the Court of Appeal informed Mr. Morrison accordingly and requested him to advise the Court of the name of counsel retained. No reply was received from the author, and a second similar letter was sent to the authors on 31 August 1987, informing them that their case would be heard during the Michaelmas term, to begin on 21 September 1987, and requesting them to inform the Court of the name of their counsel or to indicate if they were unable to retain counsel. Again, no reply was received, and in September 1987 the Court issued a legal aid certificate and assigned an experienced counsel to represent the authors. The State party concludes from the above that the authors had ample opportunity to retain counsel of their choice and that the appointment of legal aid counsel in the specific circumstances did not constitute a breach of the Covenant.

7.4 As regards the allegations of the conduct of the appeal, the State party argues that once competent counsel has been appointed, the manner in which the case is conducted is not the responsibility of the State.

7.5 Finally, the State party states that it will provide the Committee with information on the circumstances surrounding the death of Mr. Morrison as soon as it is available.

7.6 In January 1996, the State party informed the Committee that Mr. Graham's sentence had been commuted to life imprisonment on 29 May 1995.

8.1 In his comments on the State party's submission, counsel refers to the Privy Council's decision in Pratt and Morgan v. Attorney-General of Jamaica of 2 November 1993 and invites the Committee to adopt the Privy Council's opinion that "in any case in which an execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute inhuman or degrading treatment or punishment".

8.2 As regards the representation on appeal, counsel indicates that he is seeking further instructions from the authors and requests copies of the correspondence referred to by the State party. Counsel reiterates that the authors' representative on appeal was appointed without the authors being informed and maintains that that amounts to a violation of article 14 of the Covenant.

Issues and proceedings before the Committee

9. The Committee regrets that the State party has failed to provide information on the circumstances of Mr. Morrison's death, as requested by the Committee in its decision on admissibility.

10.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 In view of the commutation of Mr. Graham's death sentence, the Committee need not address counsel's argument that the execution of the death sentence would constitute a violation of article 6 of the Covenant.

10.3 Counsel for the authors has claimed that the time spent by the authors on death row amounts to cruel, inhuman and degrading treatment, in violation of article 7 of the Covenant. The Committee refers to its prior jurisprudence,* and in particular to its views in respect of communication No. 588/1994 (Johnson v. Jamaica), adopted on 22 March 1996 (see section W below), and states that it remains the jurisprudence of the Committee that detention on death row for a specific period of time does not amount to a violation of article 7 of the Covenant in the absence of some further compelling circumstances. In the instant case, neither the author nor his counsel have pointed to compelling circumstances, over and above the length of the detention on death row, that would render the detention cruel, inhuman or degrading treatment or punishment, in violation of article 7 of the Covenant. The Committee therefore concludes that there has been no violation of article 7.

10.4 As regards the authors' allegations concerning the preparation and conduct of the appeal, the Committee notes that it is undisputed that the hearing of the appeal was postponed on several occasions in order to allow the authors to retain counsel. Eventually, in the absence of further information from the authors as to who would represent them, the Court of Appeal decided to appoint a legal aid counsel. The authors have argued that they were not informed by the Court that a legal aid counsel had been appointed for them and that appointed counsel factually withdrew the appeal without having consulted or informed them. The Committee notes that it appears from the written judgement of the Court of Appeal that the Court did review the case proprio motu.

10.5 The Committee recalls its jurisprudence (see, inter alia, section F, para. 10.5, above) that under article 14, paragraph 3 (d), of the Covenant, the court should ensure that the conduct of a case by the lawyer is not incompatible with the interests of justice. While it is not for the Committee to question counsel's professional judgement, the Committee considers that, particularly in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed and given an opportunity to engage other counsel. The Committee is of the opinion that in the instant case, Mr. Graham and Mr. Morrison should have been informed that their legal aid counsel was not

going to argue any grounds in support of the appeal so that they could have considered any remaining options open to them. In the circumstances, the Committee finds that Mr. Graham and Mr. Morrison were not effectively represented on appeal, in violation of article 14, paragraphs 3 (b) and (d).

10.6 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its general comment No. 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review [of conviction and sentence] by a higher tribunal".[b] In the present case, since the final sentence of death was passed without adequate representation of the authors on appeal, there has consequently also been a violation of article 6 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraphs 3 (b) and (d), and consequently of article 6, paragraph 2, of the International Covenant on Civil and Political Rights.

12. As the authors' rights were violated, they are entitled to a remedy. However, the State party has commuted Mr. Graham's death sentence to life imprisonment. The Committee considers that commutation of the death sentence constitutes an adequate remedy, pursuant to article 2, paragraph 3 (a), of the Covenant, for the violation of article 6. As regards the violation of article 14, paragraph 3 (b) and (d), the State party should provide an appropriate remedy. The Committee stresses the duty of the State party to ensure that similar violations do not occur in the future.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] See Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40), annex X.F, communications Nos. 210/1986 and 225/1987, views adopted on 6 April 1989, para. 13.6.

[b] Ibid., Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, general comment No. 6 (16), para. 7.

H. Communication No. 480/1991, José Luis García Fuenzalida v. Ecuador (views adopted on 12 July 1996, fifty-seventh session)*

Submitted by:	José Luis García Fuenzalida [represented by counsel]
Victim:	The author
State party:	Ecuador
Date of communication:	4 November 1991 [date of initial letter]
Date of decision on admissibility:	15 March 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 12 July 1996,

Having concluded its consideration of communication No. 480/1991, submitted to the Human Rights Committee by Mr. José Luis García Fuenzalida under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is José Luis García Fuenzalida, a Chilean citizen, currently residing in Quito. At the time of submission of the communication, he was imprisoned at the Cárcel No. 2 in Quito. He claims to be a victim of violations by Ecuador of articles 3, 7, 9 and 14 of the International Covenant on Civil and Political Rights. He is represented by the Ecumenical Human Rights Commission, a non-governmental organization in Ecuador.

The facts as submitted by the author

2.1 The author is a hairdresser by profession. He was detained on 5 July 1989 and charged two days later with the rape, on 5 May 1989, of one D. K., a United States Peace Corps volunteer. He claims to be innocent and argues that he has never had sexual relations with any woman. The author was tried by the Tribunal Cuarto de Pichincha. On 11 April 1991, he was found guilty as charged and sentenced, on 30 April 1991, to eight years' imprisonment. On 2 May 1991, the author appealed to the Superior Court, demanding the nullity and cassation of the judgement. The request for nullity was rejected by the court and the appeal on cassation was not resolved within the period of 30 days established by law. After waiting for two years and six months for a decision by the Court of Cassation, the author withdrew his appeal on cassation in exchange for his release. He was released on parole in October 1994.

2.2 With regard to his arrest, the author states that on 5 July 1989, at approximately 7 p.m., he was detained by police officers, thrown to the floor of a vehicle and blindfolded. From the submission it is not clear whether an

* Pursuant to rule 85 of the rules of procedure, Committee member Julio Prado Vallejo did not take part in the approval of the Committee's views.

arrest warrant had been issued. The author apparently did not know the reason for his arrest and initially supposed it was in connection with drugs. It was not until two days later that he learned about the alleged rape. He was interrogated regarding his whereabouts on the day of the rape. He claims to have been subjected to serious ill-treatment, including being left shackled to a bed overnight. It is also alleged that, in contravention of Ecuadorian law and practice, samples of his blood and hair were taken.

2.3 It is alleged that during the evening of 6 July 1989, the author was blindfolded and that a brine solution was poured into his eyes and nostrils. The author alleges that at some point of the interrogation the blindfold fell from his eyes and he was able to identify an officer who, the author claims, had a grudge against him from a prior detention on suspicion of murdering a homosexual friend.

2.4 That same evening, he was taken to the Criminal Investigation Department of Pichincha (SIC-P), where he was subjected to death threats until he consented to sign an incriminatory statement. However, it is clear from the judgement that the author, during his trial, denied both the charges and the voluntariness of the statement. The judgement reflects that the author made before the judge a long and detailed statement of the facts concerning his detention and confession under duress.

2.5 The author claims that he learned of the facts of the rape only when charges were read to him on 7 July 1989, just before he was put on an identification parade in which the victim identified him. The author further alleges that, before he was put on the identification parade, he was taken to his house to shower, shave and dress, as instructed by the police. The author also claims that the police took several pieces of underwear from his house, which were then used as evidence against him, despite the testimony by a witness, MC. M. P., that they belonged to her.

2.6 Finally, the author alleges that on Saturday, 8 July 1989, he was shot in the leg by a police officer in what the police claimed was an attempt to escape and the author claims was a set-up. He was hospitalized with leg injuries and claims that the psychological torture continued while he was in the hospital. An affidavit given during the trial by a member of the Ecuadorian Human Rights Commission who visited the author in the hospital states: "I was able to see that there were two wounds on one of his legs caused by a bullet. I also saw several cigarette burns on his chest and hand." This same person further states in the affidavit: "I talked to a patient who was in the bed next to Mr. García's and asked him whether it was true that a police officer had been harassing Mr. García. He replied that he had indeed heard that person (the police officer) threaten Mr. García."

2.7 The case for the prosecution was that, during the night of 5 May 1989, D. K. was abducted by an assailant and forced into a car. The victim was kept on the floor of the car and repeatedly sexually assaulted. Finally, the victim was thrown out of the car and left on the roadside. The victim reported the incident to the Consulate of the United States of America, which reported it to the police. During the trial the police claimed that they had found the victim's underwear in the author's house.

2.8 As to the exhaustion of domestic remedies in respect of the physical abuse to which the author was allegedly subjected, it is stated that a lawyer filed a complaint against the police officers on the author's behalf. There is no further information concerning the status of the investigation of the complaint.

The complaint

3.1 The author claims to be the victim of a violation of article 3 in conjunction with article 26 of the Covenant, owing to the difficulties he encountered in retaining a lawyer, allegedly because of his homosexuality.

3.2 The author also claims to have suffered repeated violations of article 7, because he was subjected to torture and ill-treatment following his arrest. This was corroborated during the trial by a member of the Ecuadorian Ecumenical Human Rights Commission.

3.3 The author further claims a violation of article 9, because he was subjected to arbitrary arrest and detention, since he claims that he was not involved in the rape.

3.4 The author further claims that his trial was unfair and in violation of article 14 of the Covenant. In this respect, counsel contends that the accused was convicted notwithstanding the contradictory evidence contained in the statement given by the victim herself, who described her assailant as being very tall and having a pock-marked face. The author, whom the victim identified, is short, measuring only 1.50 metres, and has no pockmarks on his face.

3.5 The author also claims that, in view of the submission by the victim of a laboratory report on samples of blood and semen taken from her and samples of blood and hair taken from him against his will and showing the existence of an enzyme which the author does not have in his blood, he requested the court to order an examination of his own blood and semen, a request which the court denied.

3.6 Moreover, the author complains about the delays in the judicial proceedings, in particular the fact that his appeal on cassation had not been dealt with in the period provided for by law and that, after more than two and a half years of waiting for the decision of the Court of Cassation, he finally had to abandon that recourse in order to obtain his release on parole.

The Committee's decision on admissibility

4. On 26 August 1992, the communication was transmitted to the State party, which was requested to submit to the Committee information and observations in respect of the question of admissibility of the communication. Despite two reminders sent on 10 May 1993 and 9 December 1994, no submission had been received from the State party.

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter had not been examined under another procedure of international investigation or settlement.

5.3 The Committee noted with concern the absence of cooperation from the State party, despite the two reminders addressed to it. On the basis of the information before it, the Committee found that it was not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

5.4 The Committee considered that the author had not substantiated, for purposes of admissibility, that he had been unequally treated owing to his homosexuality and that that had been the cause of his difficulty in retaining a lawyer. That part of the communication was therefore declared inadmissible under article 2 of the Optional Protocol.

5.5 With respect to the author's complaint that he had been subjected to torture and ill-treatment, in violation of article 7 of the Covenant, as attested to by a member of the Ecuadorian Ecumenical Human Rights Commission during the trial, the Committee found that the facts as submitted by the author, which had not been contested by the State party, might raise issues under both articles 7 and 10 of the Covenant. In the absence of any cooperation from the State party, the Committee found that the author's claims were substantiated, for the purposes of admissibility.

5.6 With regard to the allegations that the author had been subjected to arbitrary detention, in violation of article 9 of the Covenant, the Committee found that the facts as submitted were substantiated, for the purposes of admissibility, and should accordingly be considered on their merits, especially with regard to the warrant of arrest and the moment at which the author was informed of the reasons for his arrest.

5.7 In respect of the author's allegations that the evidence in his case was not properly evaluated by the Court, the Committee referred to its prior jurisprudence and reiterated that it was generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. Accordingly, that part of the communication was declared inadmissible as being incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

5.8 The author also submitted information concerning the procedures at the trial and the delays of over two and a half years encountered in the appeal on cassation, which, the Committee found, raised issues under article 14 of the Covenant to be examined on the merits.

6. On 15 March 1995, the Human Rights Committee decided that the communication was admissible and that the State party and the author should be requested to submit copies of the arrest warrant and of any relevant resolutions and judgements in the case, as well as medical reports and information about investigations into the alleged physical abuse of Mr. García.

The State party's observations on the merits and comments by the author

7.1 The State party, on 18 October 1995, submitted to the Committee some documents relating to the case, without submitting a reply to the author's communication.

7.2 From the police report, it appears that the police give a version of the facts concerning torture and ill-treatment which differs from the author's version. The State party explains that it was unable to question the accused police officer because he is no longer in the police force and it has been impossible to locate him.

7.3 The judgement against the author reveals that the judge believed the police version and minimized the importance of the statement made by a nun who visited the author in the hospital, the content of which is referred to in paragraph 2.6 above.

7.4 With regard to Mr. García's leg wound, the State party insists that the shot was fired in connection with an escape attempt:

> "With regard to the wound suffered by the detainee, it is noted that during an investigation carried out on Saturday, 8 July, in Bosmediano street, where the other person involved allegedly lived, he took advantage of the inattention of the officers guarding him to make a sudden and precipitate escape; the persons responsible for the detainee shouted after him and then fired shots, one of which hit him, causing a fracture of the left femur, as a result of which he was taken to the Eugenio Espejo hospital for medical treatment; the wound was never inflicted in the offices of the former criminal investigation service of Pichincha; it is also noted that there is a statement signed in the presence of Dr. Hilda María Argüello L., second prosecutor in the Pichincha criminal court, on this incident."

The documents submitted by the State party do not indicate that the court conducted any investigation whatsoever into the circumstances in which Mr. García was wounded, such as, for example, questioning the witnesses who, according to the police, saw the author attempt to escape.

7.5 The State party also submitted the text of report No. 4271-SIC-P of 8 July 1989, drawn up by Claudio Guerra; the report shows that Mr. García was arrested on Thursday, 6 July 1989, at 10 a.m. by police officers on the basis of previous investigations, and that the police confiscated a woman's undergarment, identified as belonging to Miss D. K., in Mr. García's home. A copy of a statement by Mr. García, dated 7 July 1989, admitting to having committed the rape and to having taken Miss K's undergarment, and of another statement dated 9 July 1989 admitting his attempt to escape, have been submitted, both statements having been made before Dr. Hilda Argüello, second prosecutor of the Pichincha criminal court. A copy of a note dated 8 July 1989 by officer 06 is also attached, describing the escape attempt and indicating that other witnesses can confirm the facts, in particular that shots had first been fired in the air before the fleeing defendant was wounded. A copy of the statement by Miss D. K., dated 7 July 1989, has been submitted regarding the identification parade organized on 6 July 1989 in which she immediately identified Mr. García among a group of 10 men, and was absolutely sure that the man in front of her was indeed the man who had raped her. A medical report on Mr. García's hospitalization is also included. Another attached police report states that, prior to the investigation, some photographs were sent to Miss K., but the photograph of Mr. García was first sent by facsimile, and Miss K. stated in a telephone conversation from the United States that: "This looks the most like him of any of the photographs I have seen."

7.6 It is noted that Mr. García was released on parole on 5 October 1994 and was required to report to the prison centre every week. Mr. García has not done so, and it has not been possible to locate him, since he is not residing at his last address.

7.7 The State party submitted documents indicating that Mr. García was arrested on 6 July 1989, to be investigated for the crime of rape committed against Miss D. K., a United States national, on 5 May 1989. The register of aliens shows that Mr. García was married to an Ecuadorian woman. The State party has not sent the texts of the arrest warrant for Mr. García or of the judgements.

8.1 In a letter of 29 December 1995, the Ecumenical Human Rights Commission, which is representing Mr. García, refers to a statement made by the author in

the presence of the judge in 1989 in which he maintains that he is innocent, denies having tried to escape and accuses officer 06 of having fired at him in an interrogation room, after first placing a handkerchief on his leg. He maintains that his confession was obtained by means of torture. This statement is found in the record of proceedings.

8.2 It is argued that if the police force itself is responsible for carrying out an investigation of a complaint like Mr. García's, the notorious esprit de corps of the force gives rise to lies, and the police are always vindicated in the end so as to avoid penalties.

Examination of the merits of the case

9.1 The Committee has considered the communication in the light of all the information, materials and legal documents submitted by the parties. The conclusions it has reached are based on the following considerations.

9.2 With regard to the arrest and imprisonment of Mr. García, the Committee has considered the documents submitted by the State party, which do not show that the arrest was illegal or arbitrary or that Mr. García had not been informed of the reasons for his arrest. Consequently, the Committee cannot make a determination on the alleged violation of article 9 of the Covenant.

9.3 With regard to the allegations of ill-treatment perpetrated by a police officer, the Committee observes that they were submitted by the author to the Cuarto de Pichincha criminal court, which rejected them, as is shown by the judgement of 30 April 1991. In principle, it is not for the Committee to question the evaluation of the evidence made by national courts, unless that evaluation was manifestly arbitrary or constituted a denial of justice. The materials made available to the Committee by the author do not demonstrate the existence of such shortcomings in the procedure followed before the courts.

9.4 The file does not, however, reveal any evidence that the incident in which the author suffered a bullet wound was investigated by the court. The accompanying medical report neither states nor suggests how the wound might have occurred. Given the information submitted by the author and the lack of investigation of the serious incident in which the author was wounded, the Committee concludes that there has been a violation of articles 7 and 10 of the Covenant.

9.5 With regard to the trial in the court of first instance, the Committee finds it regrettable that the State party has not submitted detailed observations about the author's allegations that the trial was not impartial. The Committee has considered the legal decisions and the text of the judgement dated 30 April 1991, especially the court's refusal to order expert testimony of crucial importance to the case, and concludes that that refusal constitutes a violation of article 14, paragraphs 3 (e) and 5, of the Covenant.

9.6 With regard to the information submitted by the author concerning delays in the judicial proceedings, in particular the fact that his appeal was not dealt with in the period provided for by law, and that, after waiting more than two and a half years for a decision on his appeal, he had to abandon that recourse in order to obtain conditional release, the Committee notes that the State party has not offered any explanation or sent copies of the relevant decisions. Referring to its prior jurisprudence, the Committee reiterates that, in accordance with article 14, paragraph 3 (c), of the Covenant, the State party has to ensure that there is no undue delay in the proceedings. The State party

has not submitted any information that would justify the delays. The Committee concludes that there has been a violation of article 14, paragraph 3 (c), as well as of article 14, paragraph 5, since the author was obliged to abandon his appeal in exchange for conditional release.

10. The Human Rights Committee, acting in accordance with the provisions of article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, considers that the facts before it reveal violations by Ecuador of articles 7, 10, paragraph 1, and 14, paragraphs 3 (c) and (e) and 5, of the Covenant.

11. In accordance with the provisions of article 2, paragraph 3 (a), of the Covenant, the State party has an obligation to provide an effective remedy to the author. In the Committee's view, that entails compensation, and the State party is under an obligation to ensure that there will be no such violations in future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within a period of 90 days, information on the measures taken to give effect to its views.

[Adopted in English, French and Spanish, Spanish being the original version.]

I. Communication No. 505/1992, Kétényuéré Ackla v. Togo (views adopted on 25 March 1996, fifty-sixth session)

Submitted by: Kétényuéré Ackla

Victim: The author

State party: Togo

Date of communication: 11 October 1991 (initial submission)

Date of decision on admissibility: 30 June 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1996,

Having concluded its consideration of communication No. 505/1992, submitted to the Human Rights Committee by Mr. Kétényuéré Ackla under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Kétényuéré Ackla, a Togolese citizen currently residing in Lomé. He claims to be a victim of violations by Togo of articles 1, paragraphs 1 and 2; 2, paragraph 3 (a), (b) and (c); 7; 9, paragraphs 1, 2, 3 and 5; 10, paragraph 1; 12, paragraph 4; and 17, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Togo on 30 June 1988.

The facts as submitted by the author

2.1 The author, formerly a police superintendent, was dismissed from his post by decision of 13 May 1986; according to him, the decision was unjustifiable and arbitrary, and based on fabricated charges of grave professional misbehaviour (faute grave de service). Mr. Ackla himself requested the establishment of a disciplinary committee to investigate his case, but that request was not followed up on.

2.2 On 29 May 1987, the author was arrested at his residence, upon order of the State party's President, Gnassingbé Eyadéma. He was detained for eight days, apparently without charges. On the third day of his detention, he was able to contact the President. According to the author, he was detained because the President held personal grudges against him. The author contends that during his detention, his house and other properties were seized and turned over to his former wife.

2.3 Prior to his release on 6 June 1987, Mr. Ackla was notified of the President's decision to deny him the right to enter the district of La Kozah (interdiction de séjour) and his native town of Kara, situated in that district. On 24 July 1987, the police once more tried to arrest him when he returned to Kara to retrieve some personal effects. He managed to escape and subsequently requested his sister to retrieve his belongings; she was unable to do so. The

author adds that he was informed in June 1990 that the police had once again visited his home in his native town and ransacked it.

2.4 As to the requirement of exhaustion of domestic remedies, the author notes that he sent over 40 communications to the Togolese authorities, requesting his reinstatement in the police, a lifting of the interdiction to enter the La Kozah district and his native village, and the restitution of his estate. He did not receive a reply. He also unsuccessfully discussed his case with two ministers. As to steps taken to exhaust available remedies before the local courts, Mr. Ackla states that he sent a petition to an unspecified court in charge of labour disputes and that an examining magistrate informed him that he was not competent to investigate the validity of an order of President Eyadéma. The magistrate allegedly told him that only the President could reinstate him in the police force. After submitting his complaint to the Human Rights Committee, the author appealed to the President of the Court of Appeal, who is said to have replied that the administrative tribunal did not function in Togo, owing to the lack of qualified judges.

2.5 The author adds that he sought help from various local organizations, including the Togolese human rights commission, to no avail. He concludes that no effective remedies exist and that he cannot defend himself against a biased and discriminatory judicial system.

The complaint

3.1 The author seeks the restitution of his property, in particular of his home, as well as compensation for the lost revenue derived from the rental of his home, totalling 1,078,000 CFA francs by the beginning of 1992. He challenges the decision to deny him access to the La Kozah district and his native village, which remains in force, and the refusal of the Chief of National Security, dating from 1991, to reinstate him in his functions.

3.2 Mr. Ackla further complains about arbitrary and unlawful interferences with his privacy, family home and correspondence and about unlawful attacks on his honour and reputation. Furthermore, the seizure of his home and his unemployment have prevented him from meeting both his own medical expenses and the fees for the education of his children. He adds that he is now unable to pay for appropriate legal representation.

The State party's submission on admissibility and the author's comments thereon

4. In its submission under rule 91, dated 20 October 1992, the State party notes that the author has been reinstated in the police force, at a higher grade. As a result, the State party submits, the author's complaint to the Human Rights Committee should be considered moot.

5.1 In his comments, the author confirms that he was reinstated in the police force on 26 May 1992 and that, while there were initial questions about his grade, he was later reclassified at a higher level. On the private level, however, there have been no changes: neither his property nor the sums derived from its rental (1,228,000 CFA francs as of mid-January 1993) have been restituted, and the order prohibiting him from visiting the La Kozah district and his native village remains in force.

5.2 In the latter context, the author notes that, on 9 January 1993, he visited his house in Kara at his own risk, having decided to sell it to a local merchant. Upon his arrival, he was threatened by his ex-wife and her sons, who

sought to have him arrested upon orders of the mayor of Kara and tried to discourage the potential buyer of the house. As a result, Mr. Ackla was unable to sell the house.

The Committee's admissibility decision

6.1 The Committee considered the admissibility of the communication at its fifty-first session. The Committee noted the State party's contention that as Mr. Ackla was reintegrated in the police, his complaint should be considered moot, but considered that the author's claims relating to arbitrary arrest and detention, to expropriation of his house and to the restrictions on his freedom of movement were distinct from his claims related to his dismissal, in 1986, from the civil service, and thus had not become moot.

6.2 The Committee noted that the author's claims under articles 7, 9 and 10, paragraph 1, of the Covenant related to events that occurred prior to 30 June 1988, the date of entry into force of the Optional Protocol for the State party. In this respect, therefore, the Committee decided that the communication was inadmissible ratione temporis.

6.3 Concerning the author's claim relating to the failure of the authorities to restitute his property and the rents derived from unlawful rental thereof, the Committee noted that, irrespective of the fact that the confiscation took place prior to the date of entry into force of the Optional Protocol for Togo, the right to property was not protected by the Covenant. Accordingly, the Committee decided that this claim was inadmissible ratione materiae, under article 3 of the Optional Protocol.

6.4 The Committee considered that the author had failed to substantiate, for purposes of admissibility, his claims under articles 1 and 2 of the Covenant and concluded that the facts as submitted did not raise issues under those provisions.

6.5 As to the author's claim under article 17, the Committee noted that on the basis of the information given by the author, which had remained uncontested, interferences with his home, his privacy and his honour and reputation continued after 30 June 1988. However, there was nothing to indicate that the author had sought to have that issue adjudicated before the domestic tribunals and, in particular, before the civil courts; his generalized claim that he was defenceless against a biased and partial judicial system had not been further corroborated. The Committee considered that mere doubts about the effectiveness of civil remedies did not absolve the author from attempting to exhaust them. In this respect, the Committee concluded that the author had not satisfied the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.6 Finally, as to the author's claim under article 12 of the Covenant, the Committee noted that the State party had not contested that the prohibition, pronounced against the author, to enter the La Kozah district and to visit his native village was still in force. The Committee noted that the author had sought to bring the matter to the attention of the judicial authorities, who had replied that administrative tribunals were inoperative in Togo. In those circumstances, the Committee concluded that no effective remedy was available to Mr. Ackla.

7. Accordingly, on 30 June 1994 the Human Rights Committee decided that the communication was admissible insofar as it might raise an issue under article 12 of the Covenant.

Issues and proceedings before the Committee

8. The deadline for the submission of the State party's observations under article 4, paragraph 2, of the Optional Protocol expired on 10 February 1995. No submission has been received from the State party, in spite of two reminders addressed to it on 14 July and 31 August 1995. The Committee regrets the absence of cooperation on the part of the State party as far as the merits of the author's claims are concerned. It is implicit in article 4, paragraph 2, of the Optional Protocol that a State party must furnish the Committee, in good faith and within the imparted deadlines, with all the information at its disposal. In the absence of information from the State party, due weight must be given to the author's allegations, to the extent that they have been substantiated.

9. Accordingly, the Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10. The Committee notes that the only admissible issue, which has to be examined on the merits, is the author's uncontested allegation that he is under prohibition of entering the district of La Kozah and his native village, which forms part of that district. Article 12 of the Covenant establishes the right to liberty of movement and freedom to choose residence for everyone lawfully within the territory of the State. In the absence of any explanation from the State party justifying the restrictions to which the author has been subjected, pursuant to paragraph 3 of article 12, the Committee is of the opinion that the restriction of the author's freedom of movement and residence is in violation of article 12, paragraph 1, of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 12, paragraph 1, of the International Covenant on Civil and Political Rights.

12. Pursuant to article 2, paragraph 3 (a), of the Covenant, Mr. Ackla is entitled to an effective remedy. In the Committee's opinion, that remedy should entail measures to immediately restore Mr. Ackla's freedom of movement and residence, as well as appropriate compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State Party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

J. Communication No. 512/1992, Daniel Pinto v. Trinidad and Tobago (views adopted on 16 July 1996, fifty-seventh session)

Submitted by:	Daniel Pinto
Victim:	The author
State party:	Trinidad and Tobago
Date of communication:	24 June 1992 (initial submission)
Date of decision on admissibility:	25 October 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 July 1996,

Having concluded its consideration of communication No. 512/1992, submitted to the Human Rights Committee by Mr. Daniel Pinto under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Daniel Pinto, a Trinidadian citizen currently serving a sentence of life imprisonment at the Carrera Convict Prison in Trinidad and Tobago. A death sentence imposed on him in June 1985 was commuted to life imprisonment by the President of Trinidad and Tobago in November 1992. In respect of an earlier case submitted by the author to the Committee, the Committee had found, in its views,* that the author had been sentenced to death without enjoying the right to a fair trial, and it had expressed the view that he was entitled to a remedy entailing his release. In the present communication, the author asserts that the State party has failed to implement the Committee's views and that he is the victim of new violations of his human rights by Trinidad and Tobago.

The facts as submitted by the author

2.1 In his submission of 24 June 1992, the author complains about the prison conditions and the treatment he is subjected to in prison. He states that, in spite of repeated recommendations of the prison doctor during the past four years, the prison authorities have failed to take him to hospital, in spite of numerous appointments scheduled at long intervals, which apparently were all cancelled. As a result, the author contends, he is gradually becoming blind.

2.2 Mr. Pinto further claims that for over 8 years out of 10 years in prison, he has been prevented by the prison authorities from receiving urgently needed dental treatment. That has caused considerable pain and discomfort. In addition, his repeated complaints about nervous disorders have allegedly been ignored.

2.3 In his initial submission, while still on death row, the author complained that he was kept in a prison wing where it was impossible to distinguish between day and night, and that he was being denied the daily hour of recreation and exercise outdoors, to the detriment of his health. Since the commutation of his sentence, he claims, the general conditions of his detention have not improved. Sometime either late in 1992 or early in 1993, he was transferred to an island prison (Carrera Convict Prison), where violations of the prisoners' rights are said to be common and conditions of detention deplorable. In particular, the author claims that he is being "victimized and oppressed" because of his human rights complaints to various organizations. He also complains that the prison authorities interfere with his mail and his correspondence, suppressing whatever he would like to send that is critical of their attitude and activities.

The complaint

3. Although the author does not invoke specific provisions of the Covenant, it transpires from the above that he claims to be a victim of a violation of articles 7 and 10 of the Covenant, on account of lack of medical treatment and his conditions of detention, and of article 17, because of the alleged interference with his mail and correspondence.

The State party's information and observations and the author's comments

4.1 In a submission dated 4 March 1993, the State party observes that the author has failed to complain about the above events to the competent national authorities. Thus, he has neither filed a formal complaint with the prison administration nor petitioned the President. The State party adds that it became aware of some of the matters through information received from the author "on request", and that remedial action was "simultaneously initiated".

4.2 The State party observes that the procedure of complaints about conditions of detention or other events in prison is governed by rules 278, 279 and 280 of the prison rules. Thus, rule 278 stipulates that arrangements must be made to record any request from a prisoner to see either the superintendent, deputy superintendent or assistant superintendent. Rule 279 lays down that the aforementioned prison officials must hear applications from prisoners "at a convenient hour on every day, other than Saturday and Sunday". Finally, rule 280 states that "[p]etitions from prisoners shall be submitted in the prescribed form and shall be forwarded, along with the comments of the Superintendent, to the Inspector for his comments, before being forwarded ... to the President". It is submitted that the author did not use any of these channels.

4.3 With regard to the author's eye treatment, the State party provides the following chronology:

> The author's initial request for treatment was made to the prison's medical officer on 26 August 1986. He attended the eye clinic of the Port-of-Spain General Hospital thereafter and was given glasses on 18 September 1987, at government expense. A new request for a new pair of glasses was filed on 21 February 1992. Mr. Pinto was referred to the eye clinic and given appointments for 12 March and 21 May 1992; a police escort was unavailable on those dates, and the author could not keep the appointments. He did, however, attend the clinic on 6 August 1992, and another appointment was scheduled for 6 December 1992.

4.4 For dental treatment, the author's initial request was filed in August 1987. A dentist recommended fillings and partial dentures at a cost of $2,045. This was approved on 4 September 1987, but owing to financial constraints, only the fillings were completed on 10 October 1987. On 10 October 1989, the author made another request for dental treatment. Again, a dentist recommended an extraction and two fillings at a cost of $265. Approval for the treatment was subsequently granted, but on 14 August 1992 (!), the author refused the treatment.

4.5 As to the author's nervous disorders, it is submitted that, Mr. Pinto was examined by the prison's medical officer on 11 September 1985 and given continuous medication until 2 February 1986. On an unspecified subsequent date, the author again saw the medical officer about the same problem and was prescribed medication until 4 April 1989.

4.6 The State party notes that the author was given a general medical examination on 13 October 1992 and found mentally and physically fit. The medical certificate notes merely a minor complaint related to mild myopia and to mild lower back pain.

4.7 The State party rejects as "totally false" the author's claim that he is (was) confined to a prison area where it is impossible to distinguish between day and night and that he is being denied daily recreation. It submits that prisoners of the author's status are relocated regularly within the section of the prison they occupy. Lighting and ventilation of the cells are said to be adequate, enabling the occupants to discern day or night. Like other prisoners in the same section, the author benefits from one hour of daily recreation, which is sometimes but rarely cancelled owing to bad weather. The State party contends that the author's claims "are a deliberate attempt to misrepresent to the ... Committee that as a prisoner he is undergoing undue hardships which will ... weigh heavily in the event of a reprieve".

4.8 In a subsequent submission of 19 May 1993, the State party notes that on 12 November 1992, the author's death sentence was commuted to life imprisonment with hard labour by the President of Trinidad and Tobago.

5.1 The author was provided with an opportunity to respond to the State party's submission. As he did not reply within the prescribed deadline, a reminder was sent to him on 19 August 1993. In two letters dated May 1994, the author complains that he had prepared replies to the State party's submission and handed them to the Acting Assistant Superintendent (?) who in turn forwarded them to the Deputy Commissioner for Prisons. At that level, the author submits, his reply was "suppressed".

5.2 In two other letters dated 13 May and 5 September 1994, the author complains that he does not receive the correspondence from the Committee's secretariat in respect of the present communication. It would appear that two secretariat letters dated 3 May and 26 August 1994 did not reach him. Finally, he refers to a five-page document dated 28 May 1994, which he submitted in reply to the State party's submission and which he claims in turn did not reach the Committee.

The Committee's admissibility decision

6.1 The Committee considered the admissibility of the communication during its fifty-second session. It noted the State party's contention that the author had

not availed himself of the procedures laid down in rules 278 to 280 of the Trinidadian prison rules. On the other hand, it observed that the author had brought his grievances to the attention of the domestic authorities. Given his situation, first on death row and after 13 November 1992 as a person serving a term of life imprisonment, it could not be held against him if he had not done so in the prescribed form. It would have been incumbent upon the prison authorities to investigate his complaint(s) ex officio and with due diligence and expedition. In this context, the Committee noted that the State party had merely invoked the prison rules and the fact that Mr. Pinto had not availed himself of the procedure spelled out in those rules; it did not state whether or not any follow-up had been given to the author's complaint(s), in whatever form. In the circumstances, the Committee considered that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met.

6.2 The Committee concluded that the author had sufficiently substantiated, for purposes of admissibility, his claim of inadequate medical attention and of interference with his correspondence, and that those issues should be considered on their merits.

6.3 On 25 October 1994, therefore, the Committee declared the communication admissible insofar as it appeared to raise issues under articles 7, 10 and 17 of the Covenant.

Absence of State party cooperation on the merits and the author's further comments on the merits

7.1 The deadline for submission of the State party's information and observations under article 4, paragraph 2, of the Optional Protocol expired on 3 May 1995. No additional information has been received from the State party, in spite of two reminders addressed to it on 1 September and 21 November 1995, and despite the seriousness of the allegations contained in paragraphs 7.3 and 7.4 below.

7.2 In several letters between 10 April and 6 September 1995, the author provides information about his efforts to obtain a favourable recommendation from the Advisory Committee on the Power of Pardon of Trinidad. His petition for release had been submitted to that body after the Committee's decision on communication No. 232/1987, referred to in paragraph 1 above. On 23 July 1995, his case was heard by the Advisory Committee but, according to the author, "placed on hold indefinitely". While six other prisoners under sentence of life imprisonment were released upon recommendation of the Advisory Committee, the author's own release was denied.

7.3 The author notes that the Advisory Committee had requested two reports on his case from the prison authorities; those reports allegedly were prepared in January and February 1995. The prison authorities apparently informed him repeatedly that the reports sent to the Advisory Committee were very unfavourable, militating heavily against his release. Mr. Pinto dismisses the reports of the prison welfare officer and the prison administration as malicious and totally unfounded. In this context, he argues that the prison authorities were eager to humiliate him because he had, while on death row, submitted his complaint to the United Nations and to other organizations and prominent politicians. Thus, the prison officers reminded him that the Minister for National Security was the Chairman of the Advisory Committee and the Attorney-General another member and that it was fully within their discretion to reject his request for release. To the author, the authorities manipulated his

file: "I've a very good record in prison but they [want to] fight me down because of my human rights struggle."

7.4 The author adds that the welfare officer who prepared the report on him confessed to him on 28 September 1995 that he had drafted the report upon instructions of his superiors and the prison administration, that he had never interviewed anyone on the matter and that the prison authorities were engaged in "corrupt" practices concerning the case, with the sole view of keeping the author in prison forever. The author now seeks the Committee's intervention with the State party's Government.

7.5 In a letter dated 8 November 1995, Mr. Pinto's former counsel before the Committee confirms that the Advisory Committee on the Power of Pardon of Trinidad has indefinitely deferred a decision in the case. Counsel repeats the author's allegations contained in paragraph 7.3 above, i.e. that the Trinidadian authorities have told the author that they would seek to prevent his release because of the action he had taken to complain about his case to the United Nations.

Examination of the merits

8.1 The Human Rights Committee has considered the case in the light of all the information made available to it by the parties to the present case, as it is required to do under article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes with utmost concern the non-compliance of the State party with the Committee's recommendation on the views adopted on 20 July 1990 in respect of Mr. Pinto's first communication.[a] It is equally concerned about the author's and counsel's allegation that Mr. Pinto's request for release to the Advisory Committee on the Power of Mercy was denied because of his previous complaint(s) to the Committee. In this context, the Committee notes that the main theme of the author's correspondence (in excess of 20 letters, including 2 to the Special Rapporteur for follow-up on views) pertains primarily to the implementation of the recommendations in the previous case.

8.3 The author has complained about appalling conditions of detention and harassment at the Carrera Convict Prison. The State party has only refuted that allegation in general terms; on the other hand, the author has failed to provide details on the treatment he was subjected to, other than by reference to conditions of detention that affected all inmates equally. On the basis of the material before it, the Committee concludes that there has been no violation of article 7. However, to convey to the author that the prerogative of mercy would not be exercised and his early release denied because of his human rights complaints reveals lack of humanity and amounts to treatment that fails to respect the author's dignity, in violation of article 10, paragraph 1.

8.4 As to the author's claim of denial of medical treatment, the Committee notes that the author was provided with an opportunity to comment on the State party's detailed account of 4 March 1993 in this respect; he retained that opportunity even after informing the Committee that comments allegedly prepared on 28 May 1994 had not reached the Committee. He never subsequently provided any information as to the contents of that document. As a result, the State party's submission that Mr. Pinto did receive ophthalmologic, dental and stress treatment is uncontested. In the circumstances, the Committee finds that such medical attention as the author received while on death row did not violate articles 7 or 10, paragraph 1.

8.5 The author has finally contended that his correspondence is being interfered with arbitrarily, in violation of his right to privacy. Although the State party has failed to comment on that allegation, the Committee notes that the material before it does not reveal that the State party deliberately withheld or intercepted some of the author's letters to the Committee; many letters written before and after the adoption of the admissibility decision in October 1994, including handwritten "copies" of letters to the Permanent Secretary of the Ministry of National Security and the Attorney-General, and which contained serious allegations against the State party, did in fact reach the Committee without undue delay. There is no evidence that their content was interfered with. After carefully weighing the information available to it, the Committee finds no violation of article 17, paragraph 1, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation of article 10, paragraph 1, of the Covenant.

10. The Committee is of the view that Mr. Pinto is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy. This should include measures that will prevent a recurrence of treatment such as the author has been subjected to.

11. By ratifying the Optional Protocol, the State party has recognized the competence of the Committee to establish whether there has been a violation of the Covenant or not. It has further undertaken to ensure to all individuals subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation of the Covenant has been found. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its views.

12. The Committee notes that the State party has not thus far given effect to the Committee's views of 20 July 1990[a] in respect of Mr. Pinto's initial communication, in which the Committee decided that he was entitled to a remedy entailing his release. While the death sentence imposed on the author has been commuted to life imprisonment, the fact remains that he has not been released. The Committee notes its previous finding that the author did not have a fair trial. The continued detention of a person sentenced after an unfair trial may raise issues under the Covenant. The Committee therefore calls upon the State party to remedy the violations of the Covenant established in the views of 20 July 1990 by releasing the author and to inform the Committee of any action taken in this regard as soon as possible.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] Official Records of the General Assembly, Forty-fifth session, Supplement No. 40 (A/45/40), vol. II, annex IX.H, communication No. 232/1987 (Pinto v. Trinidad and Tobago), views adopted on 20 July 1990.

K. Communication No. 519/1992, Lyndon Marriott v. Jamaica (views adopted on 27 October 1995, fifty-fifth session)

Submitted by: Lyndon Marriott [represented by counsel]

Victim: The author

State party: Jamaica

Date of communication: 14 July 1992 (initial submission)

Date of decision on admissibility: 30 June 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 October 1995,

Having concluded its consideration of communication No. 519/1992, submitted to the Human Rights Committee by Mr. Lyndon Marriott under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Lyndon Marriott, a Jamaican citizen currently serving a sentence of life imprisonment at St. Catherine District Prison. He claims to be a victim of violations by Jamaica of articles 7 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author was arrested on 12 March 1987 and charged with the murder on the same day of Aston Nugent. He was tried in the Home Circuit Court, Kingston, found guilty as charged and sentenced to death on 16 December 1987. The Court of Appeal dismissed his appeal on 3 October 1988. A further petition for special leave to appeal was dismissed by the Judicial Committee of the Privy Council on 4 October 1990. According to counsel, the author's case has been reviewed pursuant to the Offences against the Person (Amendment) Act, 1992. The murder for which the author was convicted has been classified as a non-capital murder; consequently, the author's death sentence was commuted to life imprisonment in December 1992. He will be entitled to parole after 15 years.

2.2 During the trial, Rosetta Brown, a former girlfriend of the author and, at the time of the incident, the girlfriend of the deceased, testified that on 12 March 1987, the author arrived at the deceased's house, at which she was staying, and told her to go home. She walked over to a neighbour's yard, followed by the author and the deceased. The two men started a dispute about her. Nugent apparently tried to disengage the author, who had taken hold of Brown's blouse, upon which the author stabbed Nugent with a knife. Rosetta Brown testified that she saw the author take out the knife from his waist, but that she could not see him stab Nugent, since she was standing behind the

deceased. Dorette Williams, a neighbour, testified that she saw the author stab the deceased in the chest.

2.3 The third prosecution witness, Rosemarie Barnett, was another friend of both the deceased and the author. She testified that the author had come to her house in the morning of 12 March 1987, threatening to kill Nugent. He returned to her home an hour later, holding a knife with blood on the handle and telling her that he had stabbed him.

2.4 In an unsworn statement from the dock, the author contended that Nugent had pushed and kicked him; that Nugent had then pulled a knife from his pocket and raised it in order to stab the author; and that, in the ensuing struggle, Nugent was stabbed.

The complaint

3.1 The author contends that he was denied a fair hearing by an impartial tribunal, in violation of section 20 (1) of the Jamaican Constitution and article 14 of the Covenant. He claims that the judge failed to direct the jury properly on the issue of provocation and that he withdrew the issue of self-defence from it. Moreover, the trial judge was allegedly biased against the author and made ironical and provocative comments on the sentence, which were later criticized by the Court of Appeal and which, according to the author, provide further evidence of the court's bias.

3.2 The author further contends that the foreman of the jury was an acquaintance of the deceased and that the court was therefore not impartial. It is further submitted that the defence was not informed at the preliminary hearing that the prosecution would call a third witness at the trial, so that no counter-arguments could be prepared.

3.3 Furthermore, the author submits that before the Court of Appeal, his counsel, who had not represented him at first instance, made no submissions in support of the appeal. Counsel, who was assigned to the case by the Jamaica Council for Human Rights, explains that there were issues which could have been raised at first instance, but, since "the incompetence of counsel is not a ground for appeal", he claimed that it would have been futile to canvass that aspect.

3.4 The author finally asserts that the time spent on death row, during which he could not avail himself of appellate remedies, constitutes cruel, inhuman or degrading treatment within the meaning of section 17 (1) of the Jamaican Constitution and article 7 of the Covenant.

The State party's observations on admissibility and the author's comments thereon

4.1 By submission of 22 June 1993, the State party argues that the communication is inadmissible. It refers to section 25 of the Jamaican Constitution, which provides that anyone who alleges that any of his constitutional rights have been violated may apply to the Supreme Court for redress. The right to fair trial is protected by section 20 of the Constitution. Since the author has not filed a constitutional motion, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies.

4.2 The State party further argues that the communication raises issues of facts and evidence which the Committee is not competent to determine. It argues that the communication is inadmissible also on that ground.

5.1 In his comments on the State party's submission, counsel for the author contests that an application to the Supreme Court of Jamaica under section 25 of the Jamaican Constitution is an available and effective remedy in the circumstances of the author's case. In that connection, he states that no legal aid is available to the author to pursue that remedy. He further argues that, since the author had available to him an appeal to the Court of Appeal and to the Privy Council, the Supreme Court would not have exercised its powers, pursuant to section 25, paragraph 2, of the Constitution.

5.2 With regard to his claim under article 7 of the Covenant, counsel claims that a constitutional motion would have been ineffective, since the Supreme Court would have considered itself bound by the decision of the Judicial Committee of the Privy Council in 1981 (Riley v. Attorney-General), in which it was held that, whatever the reasons for delay, the Privy Council would not allow a ground that an execution contravened section 17 of the Jamaican Constitution.

5.3 Finally, counsel argues that the author does not request the Human Rights Committee to evaluate the facts of the case and that he does not raise issues of facts and evidence. Counsel emphasizes that the author requests the Committee to determine whether he has received a fair hearing within the meaning of article 14 of the Covenant, and that the facts and issues of the case are relevant, bearing in mind that a defendant should not be convicted of a capital offence except upon clear and incontrovertible evidence.

The Committee's admissibility decision

6.1 The Committee considered the admissibility of the communication during its fifty-first session.

6.2 The Committee recalled its constant jurisprudence that for purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must be both effective and available. The Committee noted that the Supreme Court of Jamaica had, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in those cases had been dismissed. However, the Committee also recalled that the State party had indicated on several occasions[a] that no legal aid was made available for constitutional motions. The Committee considered that, in the absence of legal aid, a constitutional motion did not, in the circumstances of the instant case, constitute an available remedy which had to be exhausted for purposes of the Optional Protocol. In this respect, the Committee therefore found that it was not precluded by article 5, paragraph 2 (b), from considering the communication.

6.3 As regards the author's allegations relating to the conduct of the trial by the judge, the evaluation of evidence by the court, and the judge's instructions to the jury, the Committee recalled that it was generally for the appellate courts of States parties to the Covenant to evaluate the facts and evidence in a particular case; similarly, it was for the appellate courts and not for the Committee to review specific instructions to the jury by the judge, unless it was clear that the instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge manifestly had violated his obligation of impartiality. The author's allegations did not show that the judge's

instructions or the conduct of the trial suffered from such defects. In that respect, therefore, the author's claims did not come within the competence of the Committee. Accordingly, that part of the communication was inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

6.4 As regards the author's allegation that the foreman of the jury was a friend of the deceased, the Committee noted that that matter was not raised by the author or his counsel during the trial or at appeal. That part of the communication was therefore inadmissible for failure to exhaust domestic remedies.

6.5 The Committee noted that the author also claimed that his defence counsel had not been informed that the prosecution would call a third witness and that the matter was brought to the attention of the judge, but that the judge failed to adjourn the hearing to give counsel time to prepare for the cross-examination. The Committee considered that that claim might raise issues under article 14, paragraph 3 (b) and (e), of the Covenant, that needed to be examined on the merits.

6.6 As regards the author's claim concerning his legal representation at the appeal proceedings, the Committee noted that the author's lawyer was provided by the Jamaica Council for Human Rights, a non-governmental organization. The Committee considered therefore that the alleged failure to properly represent the author could not be attributed to the State party. That part of the communication was therefore inadmissible under article 3 of the Optional Protocol.

6.7 With regard to the author's claim under article 7, the Committee considered that the author had failed to show what steps he had taken to bring that complaint to the attention of the authorities in Jamaica. In this respect, the author had failed to fulfil the requirement of exhaustion of domestic remedies set out in article 5, paragraph 2 (b), of the Optional Protocol.

7. Accordingly, the Human Rights Committee decided that the communication was admissible insofar as it appeared to raise issues under article 14, paragraph 3 (b) and (e) of the Covenant.

The State party's submission on the merits and counsel's comments

8. By submission of 27 January 1995, the State party points out that the allegations relating to article 14, paragraph 3 (b) and (e), declared admissible by the Committee, relate to an issue which should have been raised as a ground for appeal. The State party cannot be held responsible for counsel's failure to do so. Since the author thus failed to avail himself of a remedy which was available to him, the State party denies that a violation has taken place.

9.1 In his comments on the State party's submission, counsel contends that the issue arising under article 14, paragraph 3 (b) and (e), involves the responsibility of the State party, in that article 14 of the Covenant is embodied in the Jamaican Constitution, whereas constitutional redress is not available to the author because of the lack of legal aid.

9.2 Counsel further claims that the issues were in fact raised on appeal, since the appeal filed by the author was based, inter alia, on the ground of unfair trial. Even though counsel for the author did not argue the grounds for appeal,

the Court should have considered the grounds ex officio. In this connection, counsel notes that the Court did review the evidence against the author proprio motu.

9.3 Counsel states that, had the author had time to consider his position in the light of the additional witness giving evidence for the prosecution, he might have decided to give sworn evidence to strengthen his position; alternatively, he might have amended his statement from the dock, addressing the third witness' evidence, or have abandoned the defence of self-defence and accident and relied solely on provocation. As it was, the combination of the new evidence together with the author's failure to give evidence enabled the judge effectively to withdraw the issues of provocation and self-defence from the jury.

9.4 Counsel further notes that the application for leave to appeal to the Judicial Committee of the Privy Council was based on the grounds of failure by the trial judge to give correct directions in respect of self-defence and provocation and argues that those issues are not to be divorced from the effect of the failure by the trial judge to allow time to consider the further evidence.

Consideration of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee notes that the trial transcript shows that counsel informed the judge that he had been unaware that the prosecution was going to call a third witness until the morning of the hearing, when a summary of the evidence was given to the defence; he did not request an adjournment. The record further shows that, immediately after the third witness was sworn, the judge adjourned the trial, at 3.38 p.m., for other reasons. The trial resumed the next day at 10 a.m. with the examination of the third witness and then counsel proceeded to cross-examine her, without requesting a further adjournment. The author himself gave his statement from the dock later that day. In the circumstances, the Committee finds that the facts before it do not show that the author's right to adequate time and facilities for the preparation of his defence and his right to have examined the witnesses against him have been violated.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any of the provisions of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] See, for example, Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.J, communication No. 283/1988 (Little v. Jamaica), views adopted on 1 November 1991, para. 6.5; and ibid., Forty-ninth Session, Supplement No. 40 (A/49/40), vol. II, annex IX.A, communication No. 321/1988 (Thomas v. Jamaica), views adopted on 19 October 1993, para. 5.2, and annex IX.G, communication No. 352/1989 (Douglas, Gentles and Kerr v. Jamaica), views adopted on 19 October 1993, para. 7.2.

L. Communication No. 521/1992, Vladimir Kulomin v. Hungary (views adopted on 22 March 1996, fifty-sixth session)*

Submitted by: Vladimir Kulomin

Victim: The author

State party: Hungary

Date of communication: 6 May 1992 (initial submission)

Date of decision on admissibility: 16 March 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 March 1996,

Having concluded its consideration of communication No. 521/1992, submitted to the Human Rights Committee by Mr. Vladimir Kulomin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Vladimir Kulomin, a Russian citizen, born in Leningrad in 1954, currently detained in Budapest. He claims to be a victim of violations of his human rights by Hungary. The Optional Protocol to the International Covenant on Civil and Political Rights entered into force for Hungary on 7 December 1988.

The facts as submitted by the author

2.1 The author lived in Budapest and was a neighbour of one D. T. and the latter's girlfriend, K. G. On 25 July 1988, the author accompanied D. T. and K. G. to her father's house; K. G. had said that they wanted to pick up some documents and that they needed the author's protection because her father was mentally disturbed. Upon arrival, K. G.'s father, when stepping outside and seeing the author, D. T. and K. G., tried to hit the author. When the author pushed him away, he fell; they then tied him up because K. G. and D. T. claimed that he was dangerous and capable of anything. After K. G. had told him that she had telephoned the psychiatric hospital and that they would pick up her father, the author left the scene.

2.2 On 8 August 1988, while he was in Leningrad, the author received a phone call from D. T. and K. G. He states that he only learned at that moment that K. G.'s father had died, but that they did not tell him about the circumstances of his death.

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* Pursuant to rule 85 of the rules of procedure, Committee member Tamás Bán did not take part in the adoption of the views. The text of an individual opinion of one Committee member is appended.

2.3 On 16 August 1988, the author returned to Budapest by train. Two days later, he was arrested at the Soviet-Hungarian border by the Hungarian police, charged with the murder of K. G.'s father and brought to Budapest. The author complains that he was not allowed to call his lawyer or the Soviet consul. After three days of interrogation, in the presence of an interpreter, he was given a form to sign. The police allegedly told him that the form was intended for the Soviet consul; however, it was intended for an extension by 30 days of his provisional custody.

2.4 The author was detained at the police station for five months. He states that: "The last two months they did not lead me to interrogation and I even thought everybody had forgotten about me. It was terrible. I did not understand one word of Hungarian. In my baggage I had a Hungarian grammar book and dictionaries but the police did not allow me to study Hungarian. Staying in the police station, I asked for my lawyer and Russian consul every day in written form, but without result (no answer). Moreover, I could not write anywhere for five months." In January 1989, the author was transferred to a prison where he was given the opportunity to study Hungarian.

2.5 As to his legal representation and the preparation of his defence, the author states that, prior to the trial, he wrote several letters to the public prosecutor's office. In August 1989, he was allowed during six days to examine the "protocol" (depositions) with the assistance of an interpreter so as to be able to prepare his defence. The author complains that his letters were not included and that he had too little time to examine the file, which consisted of 600 pages. He submits that, after examining the documents, he met with his lawyer for the first time. He complains that the lawyer was old and incapable. He submits that, although he met with the lawyer five times prior to the trial, they had to review the file every time from the start and that after the twelfth day of the trial, his lawyer asked him who K. G. actually was.

2.6 On 26 September 1989, the trial began in the municipal court of Budapest. The author was tried together with K. G. The hearing took place during 14 days, spread over a period of four months. The author reiterates that there was no evidence against him. Under cross-examination, K. G. changed her testimony on six different occasions; according to the author, her allegations against him thus became baseless. Furthermore, none of the prosecution witnesses incriminated him.

2.7 The author further submits that during the trial the judge conceded that D. T. together with K. G. had planned the murder. He complains that, despite that finding, no effort was made to find D. T., nor was the latter sentenced <u>in absentia</u>. The author further alleges that when he complained to the judge, she replied that he should complain about such matters in Siberia and that she wanted him to be the last Russian in Hungary. He submits that the judge's discriminatory remarks were deleted from the trial transcript but are recorded on tape. On 8 February 1990, the author was found guilty of homicide, committed with cruelty, and sentenced to 10 years' imprisonment, the minimum sentence established by law for that offence, with subsequent expulsion from Hungary.

2.8 The author subsequently appealed to the Supreme Court of Hungary, on the following grounds:

(a) The trial judge ruled that the author had admitted his guilt, whereas his statements to the police and depositions made at the preliminary hearing proved otherwise;

(b) The judge ruled that the blood found on the victim belonged to the author, whereas, according to the forensic expert, that evidence was highly questionable;

(c) The pathologist testified that the deceased died sometime between 25 and 28 July 1988. The judge ruled that the deceased died on 25 July 1988 (the day the author had accompanied D. T. and K. G. to the deceased's house), thereby implicating the author in the crime.

2.9 On 30 October 1990, the Supreme Court, after having heard the appeal of both the prosecutor and the defendants, sentenced the author to another four years of imprisonment, as it qualified the act for which the author had been convicted by the court of first instance as an offence committed with the objective of financial gain. The author points out that he had not been charged with robbery or theft and that there was no such evidence against him. According to the author, the Supreme Court's decision is further proof of discrimination against him. He further alleges that the Supreme Court did not take his lawyer's submissions into account and simply ignored the many contradictions in the trial transcript.

2.10 The author subsequently applied to the President of the Supreme Court for review of his case. On 12 December 1991, the Supreme Court dismissed the author's application. With this, it is submitted, all domestic remedies have been exhausted.

The complaint

3. Although the author does not invoke any of the provisions of the International Covenant on Civil and Political Rights, it appears from his submissions that he claims to be a victim of violations by Hungary of articles 9, 10, 14 and 26 of the Covenant.

The State party's observations on admissibility and the author's comments

4.1 In its submission of 25 March 1993, the State party points out that the Optional Protocol entered into force for Hungary on 7 December 1988, and argues that, in accordance with the provisions of article 28 of the Vienna Convention on the Law of Treaties, the Committee has no competence to consider individual complaints that refer to events that occurred prior to the date of entry into force of the Optional Protocol for Hungary. It submits that, accordingly, the Committee is precluded ratione temporis from considering the author's complaints insofar as they relate to his arrest and the first few months of his detention.

4.2 The State party further argues that the Committee is not competent to consider alleged violations of rights that are not set forth in the Covenant. It submits that the Covenant contains no provision preventing a tribunal of first instance from freely considering the facts that were established during the process of evaluation of the evidence, drawing reasonable conclusions with respect to the guilt of the accused and qualifying the act from the established facts. It is submitted that, accordingly, the Committee cannot consider the author's complaint ratione materiae.

4.3 The State party further submits that, similarly, the Committee has no competence to consider the author's complaint that D. T., a Bulgarian citizen, was not prosecuted or sentenced. It explains that D. T. disappeared during the proceedings and that the court of first instance issued a warrant of arrest

against him. The State party further explains that it did not request the Bulgarian authorities to extradite D. T. since, under the Hungarian-Bulgarian extradition treaty, extradition is not possible when the person to be extradited is a citizen of the other signatory party.

4.4 The State party concedes that the author has exhausted available domestic remedies in his case. It submits, however, that the author did not exhaust domestic remedies in respect of his complaint that the prison authorities obstructed his contacts with the outside. It contends that, in accordance with paragraph 36, (f), section (1), of Decree 11 of 1979, on the execution of penal measures, the author could have filed a complaint to the competent authorities if he believed that he had been obstructed in maintaining contacts with other persons. Furthermore, pursuant to paragraph 22 of Decree 8/1979 (VI.30) of the Ministry of Justice, any convict may submit a complaint requesting a remedy against personal injury. The competent authorities of the penitentiary institution are obliged to examine the complaint and the request. If the convict is not satisfied with the measures undertaken, he may submit a complaint to the officer in charge of the institution, who must take a decision within 15 days. If the convict is not satisfied with the officer's decision either, the headquarters of the Hungarian penitentiary administration will examine the complaint. The State party concludes that the author has not availed himself of his right to submit a complaint and, therefore, has not exhausted domestic remedies in this respect.

5. In his reply dated 5 May 1993, the author challenges the State party's contention that part of the communication is inadmissible ratione temporis.

The Committee's admissibility decision

6.1 The Committee considered the admissibility of the communication at its fiftieth session.

6.2 The Committee observed that the Optional Protocol entered into force for Hungary on 7 December 1988. It recalled that the Optional Protocol could not be applied retroactively and that the Committee was precluded ratione temporis from examining alleged violations of the Covenant insofar as the alleged events occurred prior to the date of entry into force of the Optional Protocol for the State party concerned. It noted that, in the instant case, part of the author's pretrial detention, as well as his trial, occurred after 7 December 1988, and that it was not precluded from considering the author's claims under articles 9 and 10 insofar as they related to that period of time.

6.3 With respect to the author's complaint that one of the suspects in the case had not been prosecuted and convicted, the Committee observed that the Covenant did not provide for the right to see another person criminally prosecuted. Accordingly, it found that that part of the communication was inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.4 The Committee observed that the author claimed that he did not have a fair trial, within the meaning of article 14 of the Covenant, and that he was discriminated against because of his nationality. The Committee was of the opinion that those issues should be examined on the merits.

7. Accordingly, on 16 March 1994, the Human Rights Committee decided that the communication was admissible inasmuch as it appeared to raise issues under articles 9, 10, 14 and 26 of the Covenant.

The State party's submission on the merits and the author's comments

8.1 By submission of 27 December 1994, the State party notes that most of the author's claims concerning his detention in police custody relate to the period before the entry into force of the Optional Protocol for Hungary and were therefore declared inadmissible by the Committee. However, the State party, in appreciation of the Committee's work, also submits its explanations with regard to the merits of those claims.

8.2 As regards the author's claims under article 9, paragraphs 2 and 3, of the Covenant, the State party submits that the author was immediately informed of the reasons for his arrest and that he was informed of the charges against him on 20 August 1988. On 22 August 1988, he was ordered to be kept in custody, in accordance with Hungarian law. He was interrogated on 29 August and 5, 14 and 20 September 1988. On 18 November 1988, he was informed of the extension of his remand in custody. On 19 December 1988, he was confronted with his co-accused, and on 5 and 6 January 1989, the presentation of the documents took place. As regards the author's complaint that he "was forgotten" for two months, the State party points out that, after 20 September 1988, the investigating authority carried out several other investigations, ordered the preparation of several expert opinions and questioned some 60 witnesses. The State party concludes that its investigating authority proceeded actively and energetically towards solving the case and that no violation of article 9 has taken place. The State party notes that the author, being a foreigner, was kept in custody since, had he returned to his home country, he could not have been extradited under the Hungarian-Soviet agreement.

8.3 As regards the issues under article 10, paragraphs 1 and 2 (a), of the Covenant, the State party, after having carefully examined all the documents, states that according to the "service note", which lists the contents of the author's luggage, his luggage did not contain books of any kind. Nor does a request for a grammar book or dictionary appear on any so-called request sheets, which contain the requests of those in custody. In this connection, the State party notes that the author did file a total of 17 request sheets and that he requested "permission for reading" only on 9 November 1988, after which it was granted. As regards the author's claim that he was not allowed to write letters for the first five months of his custody, the State party states that there is no record kept of the detainees' correspondence, so that it is difficult to verify that allegation. The State party notes, however, that no request or complaint related to correspondence appears on the request sheets or in the criminal records, and it concludes that it is improbable that the author was denied the right to write letters. Finally, the State party submits that the author was detained throughout as a prisoner on remand, separated from convicted prisoners, while awaiting trial. The State party concludes that no violation of article 10 occurred in the author's case.

8.4 As regards the author's claim that he did not have enough time for the preparation of his defence, the State party notes that a lawyer was appointed for the author on 20 August 1988 and that the request sheets show that the author asked for a meeting with the lawyer on 30 September and 13 October 1988, whereupon the lawyer was informed. Also, the author's requests of 23 August and 30 September 1988 to meet the Soviet consul were forwarded to the consulate.

8.5 As regards the author's complaint that he did not have enough time to study the documents in preparation for his defence, the State party submits that the six days that were available to the author cannot be considered too short and that he could have applied for an extension of the period, either personally or through his lawyer. As to the quality of the lawyer, the State party notes that there is no indication that the author ever complained that his lawyer was unsuitable or that he was insufficiently prepared.

8.6 As regards the author's claim that he should not have been convicted on the basis of the evidence against him, the State party submits that that is a matter for the court of first instance to decide.

8.7 With regard to the author's claims that he is a victim of discrimination, the State party notes that the author states that the discriminatory remarks made by the judge were recorded on the audio tape of the hearing but deleted from the record. The State party refers to the rules governing the record of serious criminal cases, which stipulate that the judge shall dictate the record aloud on an audio tape during the hearing and that the defendant or his lawyer have a right at any time to make comments on what the judge has dictated and to move that something other than that which the judge has dictated be placed on the record. Even if the objection by the defence has been denied by the judge, the judge's ruling is placed on record. The record dictated on the audio tape is then transcribed by the court clerks and, at that point again, objections can be made by the defence. It is clear from the record that neither the author nor his lawyer requested the inclusion of the judge's remarks in the record nor made any proposal or comment concerning either the written or the verbal record. The State party therefore concludes that there is no indication that the judge indeed made the remarks attributed to her. Furthermore, the State party points out that at any stage of the proceedings, an objection can be made about the perceived prejudice of a judge with the president of the Court. No such objection has been made by either the author or his representative. In the light of the above, the State party denies that the author has been the victim of discrimination by the judge.

8.8 From the English translation of the judgement of the court of first instance, submitted by the State party, it appears that the court found that the victim had died as a consequence of having been tied up too tightly, causing paralysis of the chest muscles, of being sedated with ethyl chloride and of suffocation because of plastic bags placed over his head. The court also found that the author had been present when the victim was sedated with the ethyl chloride and that he had actively participated in the tying up of the victim, and it considered that he could have foreseen that the victim would die as a consequence of his actions.

9.1 On 15 February 1995, the author submitted his comments on the State party's submission. He submits that the main point of his complaint is that, as a consequence of the violations of his rights, he has been convicted of murder whereas he is innocent.

9.2 The author denies ever having pleaded guilty to the murder. He further states that it is clear from the State party's submission that he was interrogated only five times during his five months' detention in the police station.

9.3 The author further maintains that his Hungarian grammar and dictionary were in the luggage he brought with him on the train from the Soviet Union and were

kept in deposit in the police station during his detention there. As regards the request sheets, the author states that in fact he could not ask for anything without the cooperation of the investigating detective. He further states that none of the detainees were allowed to have pen and paper in their cells. He claims that he verbally requested permission to write letters, through the interpreter. The author further states that he knows that on the first page of his personal file in the prison, it is written that he was not allowed to write a letter to anyone until 1 June 1989, by order of the public prosecutor.

9.4 The author reiterates that no lawyer was present during the first and second interrogations at the police station and that he did not meet his lawyer during the investigations. He further states that the six days to read through the documents was too short a period of time, since he needed the assistance of an interpreter, which requires more time. He also submits that he did not have enough time to go through the documents with his lawyer.

9.5 As to the trial, the author reiterates his allegation that the judge told him he wished him to be the last Russian in Hungary. He further reiterates that there was no proof against him.

9.6 Finally, the author states that the judge of the Supreme Court did not give any reason for sentencing him to an additional four years of imprisonment and that there are many contradictions in the judgement.

9.7 The author concludes that the State party is trying to mislead the Committee and has not examined the documents carefully.

Further submission by the State party

10.1 By note verbale of 4 December 1995, the State party was requested to clarify the legal provisions in force regarding arrest and detention at the time of Mr. Kulomin's arrest and their application to the author. By submission of 28 February 1996, the State party explains that, in 1988, arrest and detention were regulated by section 91 of the Code of Criminal Procedure, under which persons suspected of having committed a serious offence could be held in detention by the police for no longer than 72 hours. After 72 hours, detention could only be extended by decision either of the public prosecutor or the court. The State party explains that, before committing a suspect to trial, the public prosecutor had the authority to renew his detention, and after committal to trial, that authority was conferred on the trial court. Pretrial detention ordered by a prosecutor could not exceed one month but was subject to extension by order of superior prosecutors. If after one year of pretrial detention, a person was not yet committed to trial, further detention could only be ordered by the court.

10.2 As to the application of the provisions to Mr. Kulomin, the State party notes that the author was arrested on 20 August 1988 and that the Office of the Public Prosecutor in Budapest ordered his detention on 22 August 1988, that is, within the 72 hours prescribed by law. The detention was extended by various public prosecutors, by decisions of 14 September 1988, 11 November 1988, 17 January 1989, 8 February 1989, 17 April 1989 and 17 May 1989. After the author's committal for trial in May 1989, the court extended the detention on 29 May 1989 until the final court judgement. The State party concludes that the procedure followed was in compliance with Hungarian law, as required by article 9, paragraph 1, of the Covenant which states that: "No one shall be

deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".

10.3 The State party refers to the Committee's admissibility decision in which the Committee decided that it was precluded from considering alleged violations occurring prior to the date of entry into force of the Optional Protocol for the State party. The State party recalls that the Optional Protocol entered into force for Hungary on 7 December 1988, that is, after the author's arrest on 20 August 1988. The State party argues that the obligation under article 9, paragraph 3, of the Covenant to bring the author promptly before a judge or other officer authorized by law to exercise judicial power had to be fulfilled as of that date. With reference to the Committee's jurisprudence and to its general comment, the State party argues that it is clear that the delay must not exceed a few days. From this, the State party concludes that the applicability of article 9, paragraph 3, is limited in time and, in the author's case, ended somewhere in August 1988. According to the State party, compliance or non-compliance with the obligation under article 9, paragraph 3, does not have a continuing effect and the State party concludes that the question of whether Mr. Kulomin's detention was in compliance with the requirement of article 9, paragraph 3, is inadmissible ratione temporis.

10.4 As regards the compatibility of the procedure with the requirements of article 9, paragraph 3, the State party interprets the term "other officer authorized by law" as meaning officers with the same independence towards the executive as the courts. In this connection, the State party notes that the law in force in Hungary in 1988 provided that the chief public prosecutor was elected by and responsible to Parliament. All other public prosecutors were subordinate to the Chief Public Prosecutor. The State party concludes that the prosecutor's organization at the time had no link whatsoever with the executive and was independent from it. The State party therefore argues that the prosecutors who decided on the continued detention of Mr. Kulomin can be regarded as other officers authorized by law to exercise judicial power within the meaning of article 9, paragraph 3, and that no violation of the Covenant has occurred.

10.5 Finally, the State party informs the Committee that the provisions referred to above were amended by Act XXVI of 1989, which entered into force on 1 January 1990. Under the amended law, persons arrested on criminal charges shall be brought before the court within 72 hours and the court decides on pretrial detention after having heard the prosecutor and the defence. The court's orders are subject to appeal.

Examination of the merits

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

11.2 The Committee has taken note of the State party's argument that the question of whether the author was, after arrest, promptly brought before a judge or other officer authorized by law to exercise judicial power is inadmissible ratione temporis. The Committee observes, however, that the first sentence of article 9, paragraph 3, of the Covenant is intended to bring the detention of a person charged with a criminal offence under judicial control. Failure to do so at the beginning of someone's detention would thus lead to a continuing violation of article 9, paragraph 3, until remedied. The author's

pretrial detention continued until he was brought before the court in May 1989. The Committee is therefore not precluded ratione temporis from examining the question of whether his detention was in accordance with article 9, paragraph 3.

11.3 The Committee notes that, after his arrest on 20 August 1988, the author's pretrial detention was ordered and subsequently renewed on several occasions by the public prosecutor until the author was brought before a judge on 29 May 1989. The Committee considers that it is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the instant case, the Committee is not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an "officer authorized by law to exercise judicial power" within the meaning of article 9, paragraph 3.

11.4 The author has further claimed that he was not allowed to study Hungarian while in police custody and that he was not allowed to correspond with his family and friends. The State party has denied the allegations, stating that the author requested permission for reading on 9 November 1988, a request which was granted, and that there is no trace of a request concerning correspondence, but that no records of the inmates' correspondence are kept. In the circumstances, the Committee finds that the facts before it do not sustain a finding that the author was a victim of a violation of article 10 of the Covenant.

11.5 As regards the author's claim under article 14 of the Covenant, the Committee notes that a lawyer was appointed for the author on 20 August 1988, that the author requested to meet his lawyer, that the State party submits that it did forward the author's requests to the lawyer, and that the author states that he did not meet his lawyer. The Committee further notes that it is unclear when the author met his lawyer for the first time, but that it appears from the file that the author had several meetings with his lawyer before the beginning of the trial against him. Further, the Committee notes that the author was given the opportunity to study the case file in preparation for his defence, with the assistance of an interpreter, and that there is no indication that he ever complained to the Hungarian authorities about that being insufficient. As to his representation at the trial, the author has not made any specific complaint about any particular failure of his lawyer in the conduct of his defence, nor does it appear from the file that the lawyer did not represent the author properly. In the circumstances, the Committee finds that the facts before it do not show that the author was denied adequate time and facilities to prepare his defence, nor does the information before the Committee permit it to conclude that the author's lawyer did not provide effective representation in the interests of justice.

11.6 The author further has claimed that the judge at the trial of first instance was biased against him and, more specifically, that she discriminated against him because of his nationality. The Committee notes that the judgement of the court of first instance shows no trace of bias on the part of the judge and, moreover, that the author or his representative made no objection during the trial to the judge's attitude. In the circumstances, the Committee finds that there is no substantiation for the author's claim that he was discriminated against on the basis of his nationality.

11.7 As regards the appeal, the author has claimed that the Supreme Court increased his sentence for having acted with the objective of financial gain,

whereas he had never been charged with robbery or theft. The Committee notes, however, that it appears from the court documents that the author was in fact charged with murder, committed with cruelty and for financial gain. Although the court of first instance found him guilty only of murder committed with cruelty, the Supreme Court quashed the judgement and found the author guilty of murder committed with cruelty and for financial gain. The Committee further notes that the conviction and sentence imposed by the Supreme Court upon the author was reviewed by the President of the Supreme Court. The Committee therefore finds that the facts before it do not show a violation of the Covenant with regard to the author's appeal.

11.8 The Committee takes this opportunity to reiterate that it is not for the Committee but for the courts of the States parties concerned to evaluate facts and evidence in a criminal case, and that the Committee cannot assess a person's guilt or innocence. This is so, unless it is manifest from the information before the Committee that the Courts' decisions were arbitrary or amounted to a denial of justice. In the present case, nothing in the written submissions before the Committee permits such a conclusion.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 9, paragraph 3, of the International Covenant on Civil and Political Rights.

13. Under article 2, paragraph 3 (a), of the Covenant, Mr. Kulomin is entitled to an appropriate remedy. The State party is under an obligation to ensure that similar violations do not occur in the future.

14. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Appendix

[Original: English]

Individual opinion of Committee member Nisuke Ando

I do not consider that the Committee's finding of a violation of article 9, paragraph 3, in the instant case (see paragraph 12) is sufficiently persuasive. The reason behind that finding is reflected in paragraph 11.3: in the circumstances of the instant case, the Committee is not satisfied that the public prosecutor could be regarded as an "officer authorized by law to exercise judicial power" within the meaning of article 9, paragraph 3.

Article 9, paragraph 3, of the International Covenant on Civil and Political Rights stipulates that: anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. The State party interprets the term "other officer authorized by law" as meaning an officer with the same independence towards the executive as a court. It also notes that the law in force in Hungary in 1988 provided that the chief public prosecutor was elected by and responsible to Parliament and that all other public prosecutors were subordinate to the public prosecutor (paragraph 10.4).

As a matter of fact, in the domestic law of many States parties, public prosecutors are granted certain judicial power, including the power to investigate and prosecute suspects in criminal cases. In the case of Hungarian law in 1988, that power included the power to extend the detention of suspects up to one year before they were committed to trial (paragraph 10.1).

In my opinion, the pretrial detention of suspects for the period of one year seems to be too long. In addition, while I do understand that, under the Hungarian law of 1988, the public prosecutor who should decide on the extension of detention was to be different from the one who requested the extension, excessive detention was likely to occur in that type of system.

Nevertheless, I am unable to accept the categorical statement of the Committee, as quoted above, to the effect that in the Hungarian type of system the public prosecutor necessarily lacks the institutional objectivity and impartiality necessary to be considered as an "officer authorized by law to exercise judicial power" within the meaning of article 9, paragraph 3. Even in that type of system, a prosecutor's decision on the extension of the detention of a particular suspect in a given case may well be impartial and objectively justifiable. To deny such impartiality and objectivity, the Committee needs to clarify the detailed circumstances of the instant case on which it bases its finding, but such clarification is totally lacking in the Committee's views.

(Signed) Nisuke Ando

M. Communication No. 523/1992, Clyde Neptune v. Trinidad and Tobago (views adopted on 16 July 1996, fifty-seventh session)

Submitted by: Clyde Neptune

Victim: The author

State party: Trinidad and Tobago

Date of communication: 18 September 1992 (initial submission)

Date of decision on admissibility: 16 March 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 July 1996,

Having concluded its consideration of communication No. 523/1992, submitted to the Human Rights Committee by Mr. Clyde Neptune under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Clyde Neptune, a Trinidadian citizen at the time of submission of the communication awaiting execution at the State Prison of Port-of-Spain. He claims to be a victim of violations by Trinidad and Tobago of articles 9, 10 and 14 of the International Covenant on Civil and Political Rights. In December 1993, the author's death sentence was commuted to life imprisonment, following the Privy Council's judgement in Pratt and Morgan.

The facts as presented by the author

2.1 On 17 November 1985, the author was arrested for the murder of Whitfield Farrel. On 25 May 1988, the author was convicted of the charge against him by the Port-of-Spain Assizes Court and sentenced to death.

2.2 The evidence relied on during trial was that a police patrol on duty had seen the victim running out of a bar with something looking like blood on his chest. The author then came out with a knife in his hand; he first started to walk fast, then began running, before he was caught up with by the police. The author allegedly confessed having stabbed Farrel, in retaliation for stabs Farrel had inflicted on him two months before. Farrel later died in hospital from his wounds.

2.3 The author, in an unsworn statement from the dock, states that the victim had, three months before the incident, stolen his boots and that, when asked to return the boots, he had stabbed the author with a knife. On 17 November 1985, when queuing up at a chicken outlet, the author was again attacked by the man. He tried to defend himself with his fists, upon which the man produced a knife. The author held the man's hand in order to prevent him from inflicting stab wounds, in such a way that the knife pointed to the man's chest. During the

fight both of them tripped, the author falling on the victim and stabbing him with the knife by accident.

2.4 According to the author, he could not have run at the time of the crime, since he had sustained broken legs in a motor accident six months before the incident. The author asked his legal aid lawyer to obtain his medical records from the hospital, but the lawyer allegedly refused to do so. The author contends that the legal aid lawyer who was assigned to his case asked him for money, and since he did not have any, never visited him again to discuss the case.

The complaint

3.1 The author claims that his right to a fair trial was denied since the judge was, at the time of the crime, the head of the department of public prosecution and directed the police to charge him with murder. His legal aid lawyer refused to raise this issue. The judge, who was about to be transferred to another court, allegedly issued an order that the author would have to appear before him in whatever court he was transferred to. In addition, the hearing of the case, scheduled to start on 1 October 1987, was adjourned on 18 occasions, 17 of them at the request of the prosecutor, because the only witness could not be traced. The hearing finally started on 20 May 1988. The author has remained in pretrial detention since his arrest, in November 1985.

3.2 The author further complains that he and his fellow inmates are subjected to inhuman conditions of detention at the State Prison. He states that prisoners are kept all day in their cells, which measure 9 feet by 6 feet. Once every two to three weeks, the prisoners, handcuffed, are taken outside for half an hour. The author submits that he is becoming blind because of the lack of natural light. Only two visits per week, of 15 minutes each and with a prison officer remaining nearby, are allowed. The family has to provide the prisoners with airmail letter forms, for which they then have to ask the prison authorities and which they do not always receive. Allegedly, most of the letters are suppressed. Relatives also have to buy food and toiletries from the prison authorities in order to provide their imprisoned relatives with them. Dental care and medication have to be paid for. Meals are composed, for breakfast and for supper, of bread, butter, jam and black coffee, and for lunch, of rice, peas, half-rotten potatoes and rotten chicken or rotten fish. Since the bread is half-baked and meals do not contain any oil, most prisoners suffer from constipation. A doctor visits the prisoners only once a month and the commissioner of prisons about twice a year. Prisoners are regularly beaten.

3.3 The author submits that, since he was removed from death row in December 1993, he shares a cell measuring 9 feet by 6 feet with six to nine other prisoners. In the cell are only three beds and a bucket for urinating. The food is rotten and filthy, and he is allowed only one visit per month. He adds that the prison officer in charge has threatened to kill him because he filed complaints about the situation in prison.

3.4 As to the requirement of exhaustion of domestic remedies, the author states that the Court of Appeal has not yet decided on his case. Three months after his conviction, a legal aid lawyer, who had already represented him before the Assizes Court, was assigned to him in order to represent him again before the Court of Appeal. The author refused that lawyer. Three or four months later, a second lawyer agreed to represent him on a legal aid assignment. On 8 August 1989, however, that lawyer told the author that he would only represent

him for remuneration. Consequently, the author found a third lawyer, who was willing to represent him on a legal aid basis. Since 18 September 1989, the author has repeatedly been asking the authorities to assign him the third lawyer and has several times asked the other lawyer to notify the legal aid board that he is only willing to represent the author on a private basis. On 14 May 1990, however, the second lawyer wrote the author that he would examine his papers, which he had received from the registry of the Court of Appeal. The author therefore claims that his right to legal assistance of his own choosing has been denied. Subsequently, the author contacted a fourth lawyer, who reportedly will represent him before the Court of Appeal. In July 1993, the author was informed by the legal aid authorities that his appeal was scheduled for hearing no later than November 1993. In a letter dated 29 January 1995, however, the author states that his appeal has still not been heard.

The Committee's admissibility decision

4.1 The Committee considered the admissibility of the communication during its fifty-third session. It noted with concern the lack of cooperation from the State party, which had not submitted any observations on admissibility.

4.2 The Committee ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

4.3 The Committee considered inadmissible the author's claim that he had an unfair trial because the judge had been the initial prosecutor in his case and had brought the charges against him. The Committee considered that the author had failed to substantiate that allegation for purposes of admissibility.

4.4 As regards the author's claim that the circumstances of his detention were degrading, the Committee considered that, in the absence of information from the State party about effective domestic remedies available to the author and noting the author's claim that he had been threatened with death for making complaints, it was not prevented by article 5, paragraph 2 (b), of the Optional Protocol from examining the complaint.

4.5 The Committee considered that the application of domestic remedies with regard to the length of proceedings against the author and of the pretrial detention was unreasonably prolonged and that the Committee was therefore not prevented by article 5, paragraph 2 (b), of the Covenant from examining whether the communication might raise issues under article 9, paragraph 3, and article 14, paragraphs 3 (c) and 5.

5. Consequently, on 16 March 1995, the Human Rights Committee declared the communication admissible insofar as it might raise issues under article 9, paragraph 3, article 10 and article 14, paragraphs 3 (c) and 5, of the Covenant.

Issues and proceedings before the Committee

6. In a letter of 24 November 1995, counsel for the author states that he has been informed that the author's appeal was dismissed by the Court of Appeal on 3 November 1995.

7. The deadline for the submission of the State party's observations under article 4, paragraph 2, of the Optional Protocol was 1 November 1995. On 10 November 1995, the State party requested a one-month extension of the

deadline. No further submission has been received from the State party in spite of a reminder addressed to it on 17 January 1996. The Committee regrets the absence of cooperation on the part of the State party and recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that a State party must furnish the Committee, in good faith and within the imparted deadlines, with all the information at its disposal. In the absence of information from the State party, due weight must be given to the author's allegations, to the extent that they have been substantiated.

8. Accordingly, the Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.1 The Committee notes that the author's claims that he is sharing a cell measuring 9 feet by 6 feet with six to nine fellow prisoners, that there are only three beds in the cell, that there is not enough natural light, that he was taken outside for only half an hour once every two to three weeks and that the food is inedible have remained uncontested. The Committee finds that the conditions of detention as described by the author are not compatible with the requirements of article 10, paragraph 1, of the Covenant, which stipulates that prisoners and detainees shall be treated with humanity and with respect for the inherent dignity of the human person.

9.2 The Committee also notes that the author was arrested on 17 November 1985, that the trial against him started on 20 May 1988, after numerous adjournments, and that the author was kept in pretrial detention throughout that period. The Committee finds that, in the absence of any explanation by the State party and in the light of the author's claim that the reason for the adjournments was that the prosecution could not find the main witness, the delay in bringing the author to trial is incompatible with article 9, paragraph 3, and article 14, paragraph 3 (c), of the Covenant.

9.3 The author has further indicated that he expressed his wish to appeal his conviction immediately after the Assizes Court's judgement of 25 May 1988. It appears from the information before the Committee that seven years and five months elapsed before the Court of Appeal heard and dismissed his appeal. In the absence of any explanation by the State party justifying the delay, the Committee finds that such a long period between conviction and the hearing of the appeal cannot be deemed compatible with the provisions of article 14, paragraph 3 (c), read together with paragraph 5, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 9, paragraph 3, article 10, paragraph 1, and article 14, paragraphs 3 (c) and 5, of the International Covenant on Civil and Political Rights.

11. Pursuant to article 2, paragraph 3 (a), of the Covenant, Mr. Neptune is entitled to an effective remedy. The Committee has noted that the State party has commuted the author's death penalty to life imprisonment. In view of the fact that the author has spent over ten years in prison, of which five and a half years were spent on death row, the Committee considers that the appropriate remedy would be the author's early release, and, pending release the immediate improvement of the circumstances of Mr. Neptune's detention. Moreover, in order to avoid similar violations in the future, the Committee recommends that the State party improve the general conditions of detention.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

N. Communication No. 527/1993, Uton Lewis v. Jamaica (views adopted on 18 July 1996, fifty-seventh session)*

Submitted by: Uton Lewis [represented by counsel]

Victim: The author

State party: Jamaica

Date of communication: 10 December 1992 (initial submission)

Date of decision on admissibility: 15 March 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 1996,

Having concluded its consideration of communication No. 527/1993, submitted to the Human Rights Committee by Mr. Uton Lewis under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Uton Lewis, a Jamaican citizen at the time of submission of the communication awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7, 10 and 14, paragraphs 1, 3 (b), (d) and (e), of the International Covenant on Civil and Political Rights. He is represented by counsel. Mr. Lewis' death sentence was commuted to life imprisonment on 30 March 1995, following the classification of his offence as non-capital murder.

The facts as submitted by the author

2.1 On 25 October 1985, the author and one P.G. were arrested and charged with burglary, larceny and wounding one B.D. with intent. On 30 October 1985, they were both charged with the murder of B.D.; the latter had died from septicaemia resulting from infection of his wounds. On 1 May 1986, the author was found guilty as charged and sentenced to death in the St. James Circuit Court; P.G. was acquitted. The Court of Appeal of Jamaica dismissed the author's appeal on 22 May 1987. On 20 February 1991, the Judicial Committee of the Privy Council dismissed his petition for special leave to appeal. With this, it is submitted, all domestic remedies have been exhausted.

2.2 The prosecution's case was that, on 25 October 1985 at about 3 a.m., the author and P.G. broke into a shop to steal cloth. When they were surprised by B.D., the guard on duty, they attacked him with a blunt instrument and/or a knife, causing cuts to head and neck. The victim's cries for help were heard by

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* Pursuant to rule 85 of the rules of procedure, Committee member Laurel Francis did not take part in the adoption of the views. The text of an individual opinion of one Committee member is appended.

two police officers on patrol in the vicinity. According to their evidence, they saw two men, carrying rolls of cloth, running away from the shop. One of the police officers then pursued the men, whom he identified as the author and as P.G. Both were known to him.

2.3 The prosecution further relied on evidence from the owner of the shop; she testified that, three weeks prior to the burglary, the author had visited the shop but had not bought any cloth. She identified pieces of cloth, found in the possession of P.G. and of two witnesses who claimed they had received it from the author, as part of that which had been taken from her store. Furthermore, the arresting officer testified that after having charged both men with shop-breaking, larceny and wounding with intent, and after having cautioned them, the author said that "it was Allan who cut the night watchman's throat, and threw the knife in the creek". P.G. then allegedly said that it was the author who broke into the shop and attacked B.D. with the knife, upon which the author stated that he, P.G. and one Allan broke into the shop. The arresting officer further testified that the accused repeated their earlier statements after they had been charged with murder.

2.4 During the trial, the author made an unsworn statement from the dock. He testified that he had been elsewhere at the time of the murder and that he had been ill-treated by the police during the interrogation at the Montego Bay police station. He alleged that, on 25 October 1985, he had been kicked, beaten and threatened with a gun and that one of the officers hit him in his side with a big lock about 10 times. The same officer then ordered him to put his finger on the edge of a desk and struck it with a gun until his finger burst; he was then ordered to use his socks to tie up his finger and to wipe off the blood. The author further claimed that, on 28 October 1985, he was again brought to the police station for interrogation. All the officers on duty participated in beating him and one of them struck him in the face with a piece of a mirror. He was then brought back to his cell where a weight was tied to his testicles. When he regained consciousness, he was told to sign a paper, which he refused to do in the absence of a justice of the peace. He was then allegedly subjected to electric shocks applied to his ears; after this treatment, he signed the paper.

The complaint

3.1 It is submitted that, in jurisdictions based on common law, it is obligatory for the judge to warn the jury in cases involving identification evidence that experience has shown that misidentifications can occur, that even though a witness claims to know a suspect he or she may be mistaken, and that an honest witness can make mistakes. The judge should further point out to the jury the lack of an identification parade and the necessity of corroborating evidence in a case of purported identification. In the instant case, it is submitted, the judge failed to adequately instruct the jury in all of the above respects, thereby denying the author a fair trial.

3.2 The author claims that he did not receive adequate legal representation during the judicial proceedings, within the meaning of article 14, paragraph 3 (b) and (d), of the Covenant. In this context, he submits that, prior to the preliminary inquiry, he was assigned a lawyer who, however, did not even attend the hearing. Consequently, and in spite of the fact that there existed a conflict of interest between him and P.G., he was represented by the latter's lawyer. The author contends that he did not meet with the lawyer assigned to him until the day before the trial. During the interview, he informed the lawyer that there were three witnesses who could support his alibi,

and he provided the lawyer with their names and addresses. The lawyer, however, did not interview those witnesses, nor did he call them to testify on his behalf, although they were present in court. That is said to amount to a violation of article 14, paragraph 3 (e), of the Covenant.

3.3 With regard to the appeal, the author complains that he was excluded from the hearing, in breach of article 14, paragraph 3 (d), despite his request to be present in court. He submits that that was all the more serious as he did not meet with his (privately retained) lawyer prior to the hearing and only had the opportunity to communicate with him through a third party. The author further complains that the only ground argued by counsel on appeal was the inadequacy of the judge's instructions to the jury on the issue of common design; according to the author, counsel saw no merit in raising the issue of the inadequacy of his representation at the trial because, although chapter III of the Jamaican Constitution guarantees the right of an accused person to have adequate time and facilities for the preparation of the defence and to communicate with counsel of his own choosing, it does not guarantee the adequacy of the representation.

3.4 With regard to the treatment to which he was subjected on 25 and 28 October 1985 at the Montego Bay police station, the author submits that that amounts to a violation of his rights under article 7 of the Covenant. He claims that electric wire was pushed into his ears by the police officers and that the hearing in his left ear has since been impaired. He further claims that he sustained a scar on his right ear and on his finger, as a result of being struck with a piece of mirror and with a gun, respectively.

3.5 The living conditions in St. Catherine District Prison, combined with the anxiety caused by a prolonged detention on death row and the treatment to which prisoners on death row are subjected, are said to amount to a violation of articles 7 and 10 of the Covenant. With regard to his individual case, the author alleges that, on twelve occasions, he was locked up in a cell without being given water. He further alleges that the prison authorities have failed to provide the medical assistance that he requires, in spite of his requests.

3.6 The author concedes that, on request of the ombudsman, he has on occasion received medical treatment, but only on the condition that he pays for the medication prescribed. The author explains that, for the past five years, he suffers from "bumps" on his skin. The prison authorities allegedly failed to take any action in this respect until early 1992, when a member of the Jamaica Council for Human Rights intervened on his behalf. He was then allowed to visit a doctor at the hospital three times; the fourth time, however, he was not permitted to keep his appointment, nor on subsequent occasions. The author complains that he suffers from another skin disease and from recurrent stomach pains, which, according to him, are caused by the inadequacy of the prison diet. His daily ration reportedly consists of twelve biscuits, one packet of skimmed milk powder and a small quantity of dark sugar. He submits that in spite of his complaints, the diet has not been modified. Finally, it is submitted that prisoners on death row are not afforded the same facilities as other prisoners with regard to work and recreation. How that has affected the author's own situation is not substantiated.

3.7 The author finally claims that, in the absence of clear criteria for the exercise of the prerogative of mercy by the Privy Council in Jamaica, and in the light of illogical distinctions applied in practice, any decision not to exercise the prerogative of mercy in the author's case that might lead to his

execution would amount to an arbitrary deprivation of life, contrary to article 6 of the Covenant.

The State party's observations on admissibility and the author's comments

4.1 By submission of 6 April 1994, the State party argued that the communication was inadmissible for failure to exhaust domestic remedies. In this context, the State party argued that the rights protected by articles 7 and 14, paragraph 3, 14 (d) and (e), of the Covenant are coterminous with sections 17 and 20 (6) (c) and (d) of the Jamaican Constitution and that it was open to the author to seek redress for the alleged violations of his rights by way of a constitutional motion to the Supreme Court.

4.2 With regard to the author's claim that he was denied access to medical treatment, the State party indicated that it had requested the Department of Corrections to investigate the matter. The State party stated that it would inform the Committee as soon as the results of the investigation were available.

5.1 In his comments dated 4 January 1994, the author stated that, since legal aid is not made available for constitutional motions, a constitutional motion does not constitute an effective remedy in his case.

5.2 With regard to his claim that he was denied medical treatment, he stated that, on eight occasions in 1993, appointments were made for him to see a doctor, but that none of those appointments were kept. He also stated that an appointment was made to see a skin doctor in February 1994, but that prison officials refused to transport him without payment.

The Committee's admissibility decision

6.1 The Committee considered the admissibility of the communication at its fifty-third session.

6.2 It ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 The Committee took note of the State party's claim that the communication was inadmissible for failure to exhaust domestic remedies. The Committee recalled its constant jurisprudence that for purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must be both effective and available. As regards the State party's argument that a constitutional remedy was still open to the author, the Committee noted that the Supreme Court of Jamaica had, in some cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in those cases had been dismissed. However, the Committee also recalled that the State party had indicated on several occasions that no legal aid is made available for constitutional motions.[a] The Committee considered that, in the absence of legal aid, a constitutional motion did not, in the circumstances of the instant case, constitute an available remedy which needed to be exhausted for purposes of the Optional Protocol. In this respect, the Committee therefore found that it was not precluded by article 5, paragraph 2 (b), from considering the communication.

6.4 The Committee noted that part of the author's allegations related to the instructions given by the judge to the jury. The Committee referred to its prior jurisprudence and reiterated that it is generally for the appellate courts

of States parties to the Covenant to evaluate facts and evidence in a particular case. Similarly, it is not for the Committee to review specific instructions to the jury by the trial judge unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The material before the Committee did not show that the trial judge's instructions or the conduct of the trial suffered from such defects. Accordingly, that part of the communication was inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.5 The Committee took note of the author's claims that he was not adequately represented during trial, in particular that his legal aid lawyer did not represent him at the preliminary hearings, that he only met his lawyer a day before the trial and that his lawyer did not interview or call any witnesses. The Committee considered that those claims might raise issues under article 14, paragraph 3 (b), (d) and (e), of the Covenant, to be examined on the merits.

6.6 With regard to the author's complaint that his appeal did not fulfil the requirements of article 14, paragraph 3 (d), the Committee noted that the author was represented on appeal by a lawyer paid for by a relative. The Committee considered that the State party could not be held accountable for alleged errors made by a privately retained lawyer unless it had been manifest to the judge or the judicial authorities that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, that part of the communication was therefore inadmissible.

6.7 The Committee considered that the author's complaint that he was subjected to maltreatment upon his arrest in order to force him to sign a statement might raise issues under article 7 and article 14, paragraph 3 (g), of the Covenant, to be examined on the merits.

6.8 The Committee noted the State party's statement that it had ordered an investigation into the author's complaint about the lack of medical treatment. The Committee noted that almost a year had elapsed since the State party's statement and that the results of the investigation had still not been forwarded. In the circumstances, the Committee considered that the author's complaint might raise issues under article 10 of the Covenant, to be considered on the merits.

6.9 Insofar as the author claimed that his prolonged detention on death row amounted to a violation of article 7 of the Covenant, the Committee reiterated its prior jurisprudence that lengthy detention on death row does not per se constitute cruel, inhuman or degrading treatment in violation of article 7 of the Covenant.[5] The Committee observed that the author had not substantiated, for purposes of admissibility, any specific circumstances of his case that would raise an issue under article 7 of the Covenant in this respect. That part of the communication was, therefore, inadmissible under article 2 of the Optional Protocol.

7. Accordingly, on 15 March 1995, the Human Rights Committee decided that the communication was admissible insofar as it appeared to raise issues under article 7 (in respect to the maltreatment upon arrest), article 10 and article 14, paragraph 3 (b), (d) (with respect to the preliminary hearing and the trial), (e) and (g), of the Covenant.

The State party's observations on the merits and counsel's comments

8.1 The State party, by submission of 9 January 1996, argues that the author failed to mention at the preliminary enquiry that he had been subjected to ill-treatment. The State party further notes that there is no medical evidence to support his claim, although he contends that he has suffered permanent damage to his hearing.

8.2 As regards the author's representation at the preliminary hearing, the State party notes that the author was free to protest if he had not wanted the counsel of his co-accused to represent him but did not do so. Further, the State party explains that the nature of the preliminary enquiry is to establish whether a prima facie case exists, which only requires a low standard of proof. The State party contends that there is nothing to suggest that the magistrate's decision would have been different if another lawyer had represented the author.

8.3 As regards the author's representation at trial, the State party asserts that the duty of the State party is to appoint competent counsel to represent clients in need of legal aid and not to obstruct counsel in the performance of his duties.

8.4 As regards the allegations under article 10 of the Covenant, concerning the denial of medical care to the author on death row, the State party indicates that it will make an attempt to expedite the investigation and that it will forward the results to the Committee as soon as they are available.

9.1 In her comments on the State party's submission, counsel for the author points out that in view of the inadequate legal representation of the author at the preliminary enquiry, it is likely that the author did not know that he could make a statement concerning his ill-treatment or that he could make arrangements for a medical examination. Counsel notes that the author did comment on the ill-treatment when he had an opportunity to do so at his trial.

9.2 As regards the author's representation at the preliminary enquiry, counsel states that possibly the author would have gone unrepresented if he had not accepted the representation by counsel of his co-accused. It is stated that counsel for the co-accused should have informed the author of the potential conflict of interest and should not have acted for him unless specifically so instructed by the author.

Issues and proceedings before the Committee

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 With respect to the alleged violation of articles 7 and 14, paragraph 3 (g), of the Covenant, the Committee notes from the trial documents that the issue was before the jury during the trial, that the jury rejected the author's allegations and that the matter was not raised on appeal. In the circumstances, the Committee concludes that the information before it does not justify a finding of a violation of articles 7 and 14, paragraph 3 (g), of the Covenant.

10.3 As regards the author's claims concerning his representation at the preliminary enquiry and at the trial, the Committee notes that it is uncontested that the legal aid lawyer assigned to the author did not attend the preliminary enquiry, that the author was consequently represented by counsel of his co-accused with whom he had a conflict of interest, and that the author met his lawyer only one day before the commencement of the trial. The Committee considers that the author's privately retained lawyer could have brought those issues on appeal and that his failing to do so cannot be imputed to the State party. Accordingly, the Committee concludes that the information before it does not justify a finding of a violation of article 14, paragraph 3 (b), (d) and (e), of the Covenant.

10.4 As regards the author's claim that he has been denied medical treatment on death row, the Committee notes that the author has furnished specific information showing that although appointments were made for a medical doctor to see him, those appointments were not kept, and that his skin condition has been left untreated. The Committee further notes that the State party has stated that it is investigating the matter, but that, two and a half years after the complaint was brought to the State party's attention and more than a year after the present communication was declared admissible, the State party has not forwarded any information explaining the matter. In the circumstances, the Committee finds that the lack of medical treatment constitutes a violation of article 10, paragraph 1, of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 10, paragraph 1, of the International Covenant on Civil and Political Rights.

12. The Committee is of the view that Mr. Uton Lewis is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy, entailing compensation and adequate medical treatment in the future. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] See, for example, Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.J, communication No. 283/1988 (Little v. Jamaica), views adopted on 1 November 1991, para. 6.5; and ibid., Forty-ninth Session, Supplement No. 40 (A/49/40), vol. II, annex IX.A, communication No. 321/1988 (Thomas v. Jamaica), views adopted on 19 October 1993, para. 5.2, and annex IX.G, communication No. 352/1989 (Douglas, Gentles and Kerr v. Jamaica), views adopted on 19 October 1993, para. 7.2.

[b] Ibid., Forty-fourth Session, Supplement No. 40 (A/44/40), annex X.F, communications Nos. 210/1986 and 225/1987 (Pratt and Morgan v. Jamaica), views adopted on 6 April 1989, para. 13.6; ibid., Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.F, communications Nos. 270/1988 and 271/1988 (Barrett and Sutcliffe v. Jamaica), views adopted on 30 March 1992, para. 8.4; and ibid., Forty-eighth Session, Supplement No. 40 (A/48/40), vol. II, annex XII.U, communication No. 470/1991 (Kindler v. Canada), views adopted on 30 July 1993, para. 6.4.

Appendix

[Original: Spanish]

Individual opinion of Committee member Francisco José Aguilar Urbina

Although I concur with the majority opinion in the present case, the way in which it is formulated compels me to express my individual opinion. The majority opinion again maintains the earlier jurisprudence that, as far as the death row phenomenon is concerned, the time factor does not, per se, constitute a violation of article 7 of the International Covenant on Civil and Political Rights. The Committee has repeatedly maintained that the mere fact of being sentenced to death does not constitute cruel, inhuman or degrading treatment or punishment.

In this connection, I refer to my opinion and analysis regarding communication No. 588/1994 (Errol Johnson v. Jamaica) [in section W below].

(Signed) Francisco José Aguilar Urbina

O. Communication No. 537/1993, Paul Anthony Kelly v. Jamaica (views adopted on 17 July 1996, fifty-seventh session)

Submitted by: Paul Anthony Kelly [represented by counsel]

Victim: The author

State party: Jamaica

Date of communication: 15 February 1993 (initial submission)

Date of decision on admissibility: 15 March 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 July 1996,

Having concluded its consideration of communication No. 537/1993, submitted to the Human Rights Committee on behalf of Mr. Paul Anthony Kelly under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Paul Anthony Kelly, a Jamaican citizen born in 1951, at the time of submission of his complaint awaiting execution in St. Catherine District Prison, Spanish Town, Jamaica. He claims to be a victim of a violation by Jamaica of article 2, paragraph 3, and article 14, paragraphs 1, 3 (b) and 3 (d), of the International Covenant on Civil and Political Rights. He is represented by counsel. In the spring of 1995, the author's death sentence was commuted to life imprisonment as a result of the judgement of the Judicial Committee of the Privy Council in the case of Pratt and Morgan v. Attorney-General of Jamaica.

The facts as submitted by the author

2.1 On 28 April 1988, the author was found guilty by the Home Circuit Court of the murder, on 21 March 1987 at around 7.30 p.m., of Mr. Aloysius James at Chelsea, Irwin. The author's co-accused, Errol Williams, was found guilty of manslaughter. The murder was committed during an armed robbery of the deceased's home, carried out by a gang of six during a power failure. The prosecution called two eyewitnesses, the deceased's common law wife and his brother. The evidence of the brother, however, was judged to be unreliable and the jury was instructed to disregard it. The wife testified during the trial that she witnessed the shooting and that she had seen the face of the murderer by the light of a single candle.

2.2 The author's appeal against his conviction was dismissed on 13 March 1989 by the Court of Appeal of Jamaica. His petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 6 June 1991.

2.3 The author was arrested at his work place in Love Lane on 24 March 1987. He claimed to be innocent of any crime and insisted that he had spent the evening of 21 March in Love Lane in Montego Bay, several miles away from Chelsea, and that he had witnesses to corroborate his claim. He suggests that the police held a grudge against him because of a prior affair and that that is why he was arrested. After his arrest, he was not allowed to see a lawyer for five days; he did not make a statement to the police. On 2 April 1987, an identification parade took place in the presence of the author's counsel, and the author was identified by the deceased's wife as the murderer. The author claims that she was able to identify him only because he has part of an ear missing; he claims that the police had instructed her accordingly. Moreover, the identification was allegedly conducted only after a policeman prompted the witness to make an identification by asking her who killed her husband when she stood in front of the author.

2.4 During the trial, the prosecution's case was based on identification, while the defence was based on alibi. The author gave sworn evidence that he had been in Love Lane on the evening of 21 March 1987. Of the 10 people who could, according to the author, corroborate his alibi, only two were called by his lawyer to give evidence. The first defence witness, an acquaintance of the author, corroborated the author's story. The second defence witness, a policewoman who had been in the area in relation to a domestic dispute, testified at first that she had seen the author in Love Lane immediately before the power failure; the author claims that, upon indications by police officers present in the court room, she changed her testimony and told the Court that the last time she had seen the author had been around 5:45 p.m., well before the moment of the power failure. The author maintains that any of the other 10 witnesses could have testified that he was in Love Lane and seen by the policewoman much later that evening.

2.5 At the trial, the author and his co-accused both stated that they first met while in custody. The co-accused testified that he did not remember where he had been on the night of the killing. The author, however, claims that, before the trial, he discovered a piece of parchment in his co-accused's shoe with the names of the author, a policeman and two or three judges on it. When raising the issue of his discovery with his co-accused, the latter confessed his involvement in the robbery in front of the author, his lawyer and the lawyer representing the co-accused. The co-accused allegedly also disclosed the true identity of the murderer. According to the author, his co-accused made a statement, admitting that he was one of the gunmen and that the author was not involved, to a police sergeant at Banhurst police station. He did not, however, give evidence on the author's behalf during the trial, nor did the author's lawyer produce the parchment as evidence or question any witnesses about the co-accused's confession.

2.6 The author moreover states that he was informed by a police officer, Lester Davis, that the deceased's wife had admitted, when questioned on the night of the murder, that she had not been able to see the murderer's face. Although the author informed his lawyer accordingly, the issue was not raised during the trial and the deceased's wife was not cross-examined on this point. Counsel provides a copy of a written statement by Mr. Davis, dated 24 April 1990, in which he states that the deceased's wife, on the night of the killing, said that she could not identify the assailants easily, and that his

impression was that none of the eyewitnesses could identify any of the gunmen because of the lack of light.

2.7 On appeal, the author was represented by a different legal aid lawyer, who allegedly did not inform the author about the date of the appeal, did not consult with him and conceded before the court that there were no merits in the appeal. Although the lawyer was informed that there were a number of witnesses who could corroborate the author's alibi, he made no attempt to interview them, nor did he pay attention to the confession made by the author's co-accused and the statement of the police officer. Although the author had confirmed that he wanted to be present at the appeal hearing, he was not informed about the date of the appeal until after it had been dismissed.

The complaint

3.1 The author claims that his rights under article 14, paragraph 3 (b), of the Covenant have been violated, since (a) he was denied access to his lawyer until five days after having been taken into custody; (b) he was not informed of the date of the appeal hearing and therefore was unable to consult fully with his lawyer in respect of matters pertinent to the appeal; and (c) his lawyer failed to consult with him prior to the appeal.

3.2 The author further claims to be a victim of a violation of article 14, paragraph 3 (d), and refers in this context to the above and, in addition, to the failure of his counsel during the trial to object to irregularities and deficiencies in the identification parade, his failure to call key witnesses in support of the author's alibi, and his failure to put the evidence of the author's co-accused's confession before the court and to examine witnesses on that point. He also claims that the failure of his appeal lawyer to act on the information given to him, his concession to the appeal court that there was no merit in the appeal, and the court's failure to replace the lawyer in the light of that concession, amounts to a violation of article 14, paragraph 3 (d).

3.3 The author further claims to be a victim of a violation of article 14, paragraph 1, of the Covenant, because of his counsel's negligence and because of the judge's failure, during the trial, to prevent other police officers in court from influencing the testimony of the policewoman who testified on the author's behalf.

3.4 The author finally claims that article 2, paragraph 3, of the Covenant was violated, because he was denied an effective remedy in respect of the violations suffered. He claims that the constitutional motion is only a theoretical remedy for him, as the costs of instituting proceedings in the Supreme (Constitutional) Court are prohibitive and no legal aid is made available for the purpose.

3.5 Counsel argues that in capital cases, legal representation should follow the highest possible standards and not just be pro forma but effective. In this connection, he refers to the jurisprudence of the Human Rights Committee that it is axiomatic that legal assistance must be made available in capital cases. Counsel claims that the statement made by author's counsel on appeal, that he saw no merit in the case, effectively left the author without legal representation, and he refers in this connection to the Committee's views on communication No. 250/1987 (Reid v. Jamaica), adopted on 20 July 1990.* Counsel

moreover submits that the matters complained of are not merely a function of professional judgement, and that the actions and opinions of the lawyers who represented the author before the Jamaican courts do not fall within the range of reasonable professional assistance which can be expected from a defence counsel. He claims that, given that the author's conviction was based on identification evidence of a sole witness, that key alibi witnesses were not called by the defence and that the identification evidence was insufficiently tested, the ineffective representation in the author's case led to his conviction.

The State party's observations and the author's comments thereon

4. By submission of 12 October 1993, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies. In this context, the State party argues that it is open to the author to seek redress for the alleged violations of his rights by way of a constitutional motion to the Supreme Court.

5. In his comments, dated 4 January 1994, counsel notes that, since legal aid is not made available for constitutional motions, such a motion does not constitute an effective remedy in the author's case.

The Committee's admissibility decision

6.1 The Committee considered the admissibility of the communication during its fifty-third session. It noted the State party's claim that the communication was inadmissible for failure to exhaust domestic remedies and recalled its constant jurisprudence that for purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must be both effective and available. As to the State party's argument that a constitutional remedy was still open to the author, the Committee noted that the Supreme Court of Jamaica had, in some cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in those cases had been dismissed. It also recalled that the State party had indicated on several occasions that no legal aid is made available for constitutional motions. The Committee considered that, in the absence of legal aid, a constitutional motion did not, in the circumstances of the case, constitute an available remedy which needed to be exhausted for purposes of the Optional Protocol. The Committee therefore found that it was not precluded by article 5, paragraph 2 (b), from considering the communication.

6.2 The Committee considered that the author and his counsel had sufficiently substantiated, for purposes of admissibility, that the communication might raise issues under article 14 juncto 2, paragraph 3, of the Covenant, which needed to be examined on their merits.

6.3 On 15 March 1995, therefore, the Committee declared the case admissible.

The State party's observations on the merits and counsel's comments thereon

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 20 October 1995, the State party notes that the admissibility decision did not specify which provisions of article 14 of the Covenant might have been

violated and that it is clear from the author's case that not all provisions of article 14 are at issue.

7.2 On the alleged violation of article 14, paragraph 3 (b), of the Covenant, the State party notes that the author's allegation that he was denied access to an attorney for five days following his detention "will be investigated".[b] It concedes, however, that under Jamaican law, the author had the right to consult with a lawyer following his arrest. As to the alleged failure to notify the author of the date of the hearing of the appeal, the State party recalls that it is the responsibility of the Court of Appeal Registry to notify inmates of the date on which their appeals will be heard. It affirms that this "is a function which is carried out very effectively and cases of failure to discharge this duty are rare". In the author's case, the records show that the author was informed of the date of his appeal, although the exact date of the letter is not available.

7.3 As to the author's allegation that since he was unaware of the date of his appeal, he could not consult with the attorney for his appeal and the attorney failed to consult with him, the State party reaffirms that since Mr. Kelly was notified of the date of his appeal, that could not have prevented him from consulting with his counsel. Furthermore, the State party argues that it has no responsibility for the way in which legal aid counsel conducts his case: rather, it is the State's duty to appoint competent counsel to assist the accused and not to obstruct him in the conduct of the case. Once that is done, the responsibility for the conduct of the case rests with counsel, and errors of judgement or other failings cannot be attributed to the State party. The State party thus denies that there was a violation of article 14, paragraph 3 (b), in respect of notifying the author of his appeal and the latter's ability to contact his counsel.

7.4 Regarding the alleged violation of article 14, paragraph 3 (d), of the Covenant, because of counsel's conduct of the case during trial and on appeal, the State party reiterates that it cannot be held accountable for the way in which counsel conducts the defence of his client: the same considerations as set forth in paragraph 7.3 above are said to apply. The perceived negligence of counsel, including failure to object to discrepancies in the conduct of the identification parade, failure to call key alibi witnesses or to put the co-accused's confession into evidence and to examine witnesses on that point, relates, for the State party, to the conduct of the case by counsel, who merely chose to exercise his professional judgement. The State party therefore denies that there was a violation of article 14, paragraph 3 (d).

7.5 Concerning the alleged violation of article 14, paragraph 1, of the Covenant, because of the trial judge's failure to prevent police officers in the court room from influencing the testimony of a policewoman who testified for the defence, the State party notes that "there is no indication other than the author's assertion that policemen in court persuaded the policewoman to change her testimony. In the unlikely event that that did occur, there is no evidence that that fact was brought to the trial judge's attention." In the State party's opinion, it would have been clearly incumbent upon counsel to bring such an important matter to the attention of the judge. As there is no evidence whatsoever that that was done, the State party refutes that article 14, paragraph 1, has been violated.

7.6 As to the alleged breach of article 2, paragraph 3, because of the alleged unavailability of a constitutional motion to the author owing to the absence of legal aid, the State party reaffirms that there is no obligation under the Covenant to provide legal aid for constitutional motions, as article 14, paragraph 3, clearly states that the minimal guarantees of the defence, including legal assistance, concern the determination of criminal charges. Furthermore, the absence of legal aid is not a bar to the filing of constitutional motions even for indigent persons, as demonstrated by the case of Pratt and Morgan v. Attorney-General.

8.1 In her comments, counsel notes that she only learned of the commutation of the author's death sentence by letter of 29 August 1995 from the Permanent Secretary of the Governor-General's office. As a result of the commutation, her client was removed from St. Catherine District Prison, but counsel has been unable to ascertain where Mr. Kelly was transferred, in spite of two requests addressed to the State party's authorities; she thus cannot obtain his instructions as to how to respond to the State party's submission, and qualifies her comments as preliminary ones. She qualifies the State party's failure to communicate the whereabouts of Mr. Kelly as a further violation of article 14, paragraph 3 (b), of the Covenant.

8.2 Counsel reaffirms that her client had a right, under article 14, paragraph 3 (b), of the Covenant, to consult with a lawyer following his arrest. That he was unable to do so for five days - something the State party is unable to prove wrong - violated his right under that provision. As to the State party's contention that Mr. Kelly was notified of the date of his appeal, counsel notes that the State party is unable to provide the exact date of the notification letter, or indeed a copy of it. To her, Mr. Kelly's case should thus prima facie be held to constitute one of the "rare failures" to which the State party admits. Furthermore, to counsel, it "is axiomatic that the Court of Appeal had a duty to enquire into the absence of the applicant during his appeal hearing, and that the hearing should not have continued until [he] had been informed and had been given the opportunity to be present". As a result of the State party's failure to notify him of the date of the appeal, Mr. Kelly could not have consulted with counsel in preparation for the appeal hearing.

8.3 Counsel reiterates that the State party violated article 14, paragraph 3 (d), because it appointed incompetent legal aid counsel to assist the author. Those lawyers failed: (a) to notify the author of the date of the appeal when he (the lawyer) became aware of it; (b) to consult Mr. Kelly to prepare for the appeal hearing; (c) to secure the author's attendance at the appeal hearing; (d) to alert the court to the co-accused's confession; (e) to secure the attendance of witnesses; (f) to draw the court's attention to defects in the case against the author; (g) to protect generally Mr. Kelly's interests; and (h) by stating, during the appeal hearing, that there were no merits in the case. The last point, in particular, is said to be an example of "active obstruction" of the author's defence.

8.4 Still in the context of article 14, paragraph 3 (d), counsel submits that legal assistance within the meaning of that provision should be effective rather than nominal and that the issue of competence must be determined by reference to the range of reasonable professional assistance that may be expected from a defence counsel: the Committee's jurisprudence, according to which "legal

assistance to the accused in a capital case must be provided in ways that adequately and effectively ensure justice",[d] is invoked.

8.5 In the light of the considerations set forth in paragraphs 8.2 to 8.4 above, counsel contends that Mr. Kelly's trial or appeal was not "fair" within the meaning of article 14, paragraph 1, of the Covenant. Defence counsel's failure to examine defence witnesses, his failure to draw the Court's attention to the co-accused's confession, and other omissions underline the unfairness of the appeal.

8.6 Finally, counsel argues that contrary to the State party's contention, the judgement of the Judicial Committee of the Privy Council in Pratt and Morgan v. Attorney-General does not support the contention that the absence of legal aid for the purpose of constitutional motions is no bar for the filing of such motions by indigent persons. It is submitted that since legal aid is not provided for such motions, they are neither an available nor an effective remedy for the violations suffered by the author, contrary to article 2, paragraph 3, of the Covenant.

Examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 The author has claimed a violation of article 14, paragraph 3 (b), of the Covenant because he was unable to communicate with a lawyer of his choosing until five days after being taken into custody. The State party has promised to investigate the allegation but failed to report to the Committee on its findings; it does, however, admit that, under Jamaican law, the author had the right to consult with an attorney following his arrest. According to the file, which was made available to the State party for comments, the author, when brought to the police station in Hanover on 24 March 1988, told the police officers that he wanted to speak to his lawyer, Mr. McLeod, but the police officers ignored the request for five days. In the circumstances, the Committee concludes that the author's right, under article 14, paragraph 3 (b), to communicate with counsel of his choice was violated.

9.3 Regarding the alleged violation of article 14, paragraph 3 (d), because of the perceived incompetence of the author's legal aid lawyer during the conduct of the trial, the Committee notes that the materials available to it do not reveal that Mr. Kelly's lawyer's decision not to call several potential alibi witnesses, or failure to point to discrepancies in the identification parade, was attributable to anything other than the exercise of his professional judgement; that is confirmed by the author's replies to a questionnaire that was put to him by counsel for the present communication. The author did not bring his counsel's perceived failures or omissions to the attention of the Court of Appeal. In the circumstances, the Committee concludes that there was no violation of article 14, paragraph 3 (d), as far as the conduct of the trial is concerned.

9.4 As to the author's notification of the date of his appeal and his representation before the Court of Appeal, the Committee reaffirms that it is

axiomatic that legal assistance be made available to convicted prisoners under sentence of death. That applies to all stages of the judicial process. In the author's case, the first issue to be determined is whether he was properly notified of the date of his appeal and could prepare his appeal with the lawyer assigned to represent him before the Court of Appeal. Mr. Kelly insists that he was not informed of the hearing of his appeal until after its dismissal, whereas the State party argues that the Registry of the Court of Appeal notified Mr. Kelly of the date of his appeal. While the State party is unable to pinpoint the exact date of the notification or to provide a copy of the notification letter, the Committee notes from the file that the lawyer assigned to the author for the appeal, Mr. D. Chuck, was notified of the date of the appeal. That lawyer, in turn, wrote to the author in prison on 24 February 1989, asking him whether he had anything further to convey in preparation of the appeal. Mr. Kelly contends that he had had no contacts with Mr. Chuck before the receipt of the letter on 1 March but that he sent explanations to Mr. Chuck immediately thereafter. In those circumstances, the Committee concludes that the author was aware of the imminence of the hearing of his appeal.

9.5 The second issue to be determined is whether the author's legal aid lawyer for the appeal had a right to effectively abandon the appeal without prior consultation with the author. It is uncontested that Mr. Chuck did not inform the author that he would argue that there were no merits in the appeal, thereby effectively leaving Mr. Kelly without representation. The Committee recalls its jurisprudence that under article 14, paragraph 3 (d), of the Covenant, the court should ensure that the conduct of a case by the lawyer is not incompatible with the interests of justice. While it is not for the Committee to question counsel's professional judgement, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed and given an opportunity to engage other counsel. The Committee is of the opinion that in the instant case, Mr. Kelly should have been informed that his legal aid counsel was not going to argue any grounds in support of the appeal, so that he could have considered any remaining options open to him (see also section G, para. 10.5, above). In the present case, the Committee concludes that there has been a violation of article 14, paragraph 3 (d).

9.6 The author contends that article 14, paragraph 1, was violated, as the trial judge failed to intervene when police officers present in the court room during the trial sought to influence the testimony of a defence witness. None of the court or other documents made available to the Committee indicate, however, that any attempts to influence the defence witness were ever brought to the attention of the court or that the matter was raised as a ground of appeal. It would have been incumbent upon defence counsel, or the author himself, to raise a matter of such importance with the trial judge. In these circumstances, the Committee finds no violation of article 14, paragraph 1, of the Covenant.

9.7 As to the author's argument that the absence of legal aid for constitutional motions in itself constitutes a violation of the Covenant, the Committee recalls that the determination of rights in proceedings before the Constitutional Court must confirm with the requirements of a fair hearing,

within the meaning of article 14, paragraph 1. This means that the application of the requirement of a fair hearing in the Constitutional Court should be consistent with the principles of paragraph 3 (d) of article 14. It follows that where a convicted person seeking constitutional review of irregularities in a criminal trial does not have sufficient means to defray the costs of legal assistance in order to pursue said constitutional remedy, and where the interests of justice so require, legal aid should be provided by the State.[e] In the instant case, the absence of legal aid denied the author an opportunity to test the regularity of his criminal trial in the Constitutional Court in a fair hearing, and thus constitutes a violation of article 14, paragraph 1, juncto article 2, paragraph 3.

9.8 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, where no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its general comment No. 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that: "The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review [of conviction and sentence] by a higher tribunal."[f] In the present case, since the final sentence of death was passed without adequate representation of the author on appeal, there has consequently also been a violation of article 6 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Jamaica of article 14, paragraph 3 (b) and (d), and of article 14, paragraph 1, juncto article 2, paragraph 3, of the Covenant.

11. Pursuant to article 2, paragraph 3 (a), of the Covenant, Mr. Paul Anthony Kelly is entitled to an effective remedy, which, in the circumstances of the case, should entail the author's release.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40), vol. II, annex IX.J.

[b] As of 15 May 1996, no information about the result of the promised investigation had been received from the State party.

[c] Judgement of the Judicial Committee of the Privy Council of 2 November 1993.

[d] See Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40), vol. II, annex IX.H, communication No. 232/1987 (Pinto v. Trinidad and Tobago), views adopted on 20 July 1990, para. 12.5.

[e] Ibid., Forty-ninth Session, Supplement No. 40 (A/49/40), vol. II, annex IX.L, communication No. 377/1989 (Currie v. Jamaica), views adopted on 29 March 1994, paras. 13.2-13.4.

[f] Ibid., Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, general comment No. 6 (16), para. 7.

P. Communication No. 540/1993, Celis Laureano v. Peru (views adopted on 25 March 1996, fifty-sixth session)

Submitted by:	Basilio Laureano Atachahua
Victim:	His granddaughter, Ana Rosario Celis Laureano
State party:	Peru
Date of communication:	22 October 1992 (initial submission)
Date of decision on admissibility:	4 July 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1996,

Having concluded its consideration of communication No. 540/1993, submitted to the Human Rights Committee by Mr. Basilio Laureano Atachahua, on behalf of his granddaughter, Ana Rosario Celis Laureano, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Basilio Laureano Atachahua, a Peruvian citizen, born in 1920. He submits the communication on behalf of his granddaughter, Ana Rosario Celis Laureano, a Peruvian citizen, born in 1975. Her current whereabouts are unknown. The author claims that his granddaughter is a victim of violations by Peru of articles 2, paragraphs 1 and 3; 6, paragraph 1; 7; 9; 10, paragraph 1; and 24, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as presented by the author

2.1 The author, a farmer, lives with his family in the district of Ambar, Province of Huaura, Peru. In March 1992, his granddaughter, then 16 years old, was abducted by unknown armed men, presumably guerrillas of the Shining Path movement (Sendiero Luminoso). She returned six days later and told the author that the guerrillas had threatened to kill her if she refused to join them and that she was forced to carry their baggage and to cook for them, but that she had finally been able to escape. In May 1992, she was once again forced by the guerrillas to accompany them; after a shoot-out between a unit of the Peruvian army and the guerrillas, she again escaped. The author did not denounce those events to the authorities, first, because he feared reprisals from the guerrilla group, and secondly because, at the time, the regular army was not yet stationed in the Ambar district.

2.2 On 23 June 1992, Ana Celis Laureano was detained by the military, on the ground of suspected collaboration with the Shining Path movement. For 16 days, she was held at the military base in Ambar, which had been set up in the meantime. For the first eight days, her mother was allowed to visit her; for the remaining eight days, she allegedly was kept incommunicado. Upon inquiry about her whereabouts, Ana's mother was told that she had been transferred. The family then requested the provincial prosecutor of Huacho (Fiscal Provincial de la Primera Fiscalía de Huaura-Huacho) to help them locate Ana. After ascertaining that she was still detained at Ambar, the prosecutor ordered the military to transfer her to Huacho and to hand her over to the special police of the National Directorate against Terrorism (Dirección Nacional Contra el Terrorismo - DINCOTE).

2.3 During the transfer to Huacho, the truck in which Ana Celis Laureano was transported was involved in an accident. As she suffered a fractured hip, she was brought to the local quarters of the Policía Nacional del Perú, where she was held from 11 July to 5 August 1992. On 5 August, a judge on the civil court of Huacho (Primer Juzgado Civil de Huaura-Huacho) ordered her release on the ground that she was a minor. He appointed the author as her legal guardian and ordered them not to leave Huacho, pending investigations into the charges against her.

2.4 On 13 August 1992, at approximately 1 a.m., Ms. Laureano was abducted from the house where she and the author were staying. The author testified that two of the kidnappers entered the building via the roof, while the others entered through the front door. The men were masked, but the author observed that one of them wore a military uniform and that there were other characteristics, e.g., the type of their firearms and the make of the van into which his granddaughter was pulled, which indicated that the kidnappers belonged to the military and/or special police forces.

2.5 On 19 August 1992, the author filed a formal complaint with the prosecutor of Huacho. The latter, together with members of a local human rights group, helped the author to make inquiries with the military and police authorities in Huaura province, to no avail.

2.6 On 24 August 1992, the commander of the Huacho police station informed the prosecutor's office that he had received information from DINCOTE headquarters in Lima according to which Ana Celis Laureano was suspected to be the person in charge of guerrilla activities in the Ambar district, and that she had participated in the attack on a military patrol in Parán.

2.7 On 4 September 1992, the author filed a request for habeas corpus with the Second Criminal Court (Segundo Juzgado Penal) of Huacho. That initial petition was not admitted by the judge on the ground that the "petitioner should indicate the location of the police or military office where the minor is detained, and the exact name of the military officer in charge [of that office]".

2.8 On 8 September 1992, the Centro de Estudios y Acción para la Paz (CEAPAZ), intervening on behalf of the author, petitioned the National Minister for Defence, requesting him to investigate Ana Laureano's detention and/or her disappearance; it pointed out that she was a minor, and invoked, in particular, the United Nations Convention on the Rights of the Child, ratified by Peru in

September 1990. On 16 September 1992, the Secretary-General of the Ministry of Defence informed CEAPAZ that he had referred the case to the armed forces, with a view to carrying out investigations. No further information was received.

2.9 On 8 September 1992, CEAPAZ also petitioned the director of DINCOTE, asking him to verify whether Ana Celis Laureano had in fact been detained by its units and whether she had been brought to one of its quarters. On 15 September 1992, the director of DINCOTE replied that her name was not listed in the registers of detained persons.

2.10 A request for information and an investigation of the case was also sent, on 8 and 9 September 1992, to the director of the human rights secretariat of the Ministry of Defence, to the Minister for the Interior and to the commanders of the military bases in Andahuasi and Antabamba. No reply was made to those petitions.

2.11 On 30 September 1992, the author applied to the presiding judge of the Second Criminal Chamber of the District High Court (Segundo Sala Penal de la Corte Superior del Distrito Judicial de Callao) for habeas corpus, asking him to admit the application and to direct the judge of the court in Huacho to comply with the habeas corpus order. It remains unclear whether any proceedings were instituted by the judicial authorities in respect of that application.

2.12 In the light of the above, it is contended that all available domestic remedies to locate Ana Celis Laureano and to ascertain whether she is still alive have been exhausted.

2.13 On 18 September 1992, the case of Ms. Laureano was registered before the United Nations Working Group on Enforced or Involuntary Disappearances[a] (case No. 015038, transmitted to the Peruvian Government on 18 September 1992; retransmitted on 11 January 1993). In November 1992, the Peruvian Government notified the Working Group that the prosecutor's office in Huacho (Segunda Fiscalía Provincial Mixta de Huacho) was investigating the case but had not yet located Ms. Laureano or those responsible for her disappearance. It added that it had requested information from the Ministry of Defence and the Ministry of the Interior. Similar notes dated 13 April and 29 November 1993 addressed to the Working Group reiterate that investigations into the case continue but that they have so far been inconclusive.

The complaint

3.1 The unlawful detention of Ms. Laureano and her subsequent disappearance, which the author attributes to the armed forces of Peru, are said to amount to violations of articles 6, paragraph 1; 7; 9; and 10, paragraph 1, of the Covenant.

3.2 It is further submitted that the State party violated article 24, paragraph 1, as it failed to provide Ana Celis Laureano with such measures of protection as are required by her status as a minor. The State party's failure to protect her rights, to investigate in good faith the violations of her rights and to prosecute and punish those held responsible for her disappearance is said to be contrary to article 2, paragraphs 1 and 3, of the Covenant.

The State party's information and observations on admissibility and counsel's comments thereon

4.1 In a submission dated 10 June 1993, the State party draws on information provided by the Peruvian Ministry of Defence. The latter notes that in December 1992 investigations carried out by the security and armed forces confirmed that members of the military base in Ambar had arrested Ana R. Celis Laureano in June 1992. She allegedly had confessed her participation in an armed attack on a military patrol in Parán on 6 May 1992 and pointed out where the guerrillas had hidden arms and ammunition. In July 1992, she was handed over to the chief of the Policía Nacional del Perú in Huacho and subsequently to the prosecuting authorities of the same town; she was charged, inter alia, with participation in a terrorist group. Her case was then referred to the judge of the civil court, who decreed her provisional release. On 8 September 1992, the commander of the military base in Ambar inquired with the judge about the status of the case; on 11 September 1992, the judge confirmed that the girl had been abducted one month earlier and that the judicial authorities seized of the matter attributed responsibility for the event to members of the military. On 21 September 1992, the Attorney-General of the Second Prosecutor's Office (Fiscal de la Segunda Fiscalía de la Nación) reported on the action taken by his office up to that time; he issued a list of eight police and military offices and concluded that Ms. Laureano was not detained in any of those offices.

4.2 The State party reaffirms that Ms. Laureano was detained because of her terrorist activities or affinities and that she was handed over to the competent judicial authorities. It submits that, in respect of her alleged disappearance, a guerrilla intervention should not be discarded for the following reasons: (a) to prevent her from being brought to justice and revealing the structure of the terrorist branch to which she belonged; and (b) because she may have been eliminated as a reprisal for having pointed out where the guerrillas had hidden arms and ammunition after the attack in Parán. Finally, it is submitted that any presumed responsibility of the Peruvian armed forces in this respect should be removed on the following grounds: the inquiries of the Ministry of Public Affairs with the military and the police offices in Huacho and Huaura, which confirmed that Ms. Laureano was not detained; and the vagueness of the claim inasmuch as the author only refers to "presumed perpetrators" ("la imprecisión de la denuncia por cuanto en ella se hace alusiones vagas sobre los presuntos autores").

5.1 In comments dated 19 September 1993, counsel notes that the Ministry of Defence is neither competent nor in a position to draw conclusions from investigations which should be undertaken by the judiciary. He points out that the State party admits the events which occurred prior to Ms. Laureano's disappearance, i.e., that she had been detained by the military and that the judge on the civil court in Huacho himself held the military responsible for her abduction. By merely referring to the negative results of inquiries made by the Attorney-General of the Second Prosecutor's Office, the State party is said to display its unwillingness to investigate the minor's disappearance seriously and to ignore the principal elements inherent in the practice of forced disappearances, i.e., the impossibility of identifying those responsible because of the way in which security forces operate in Peru. Counsel refers to the

author's evidence about the type of clothes and arms of the kidnappers and the way in which the abduction was carried out.

5.2 Counsel contends that the State party merely speculates when it asserts that Ms. Laureano was detained because of her terrorist activities and that the guerrillas themselves may have intervened to kidnap her; he notes that it was the military which accused her of being a member of Shining Path and that the courts have not yet found her guilty. Counsel further forwards a statement from Ms. Laureano's grandmother, dated 30 September 1992, which states that both prior and subsequent to the disappearance of her granddaughter, a captain of the Ambar military base had threatened to kill her and several other members of the family.

5.3 On the requirement of exhaustion of domestic remedies, counsel suggests that the President of the High Court, having decided on the admissibility of the petition for habeas corpus, referred it back to the court of first instance which, after hearing the evidence, concluded that military personnel were involved in the abduction and disappearance of Ana R. Celis Laureano. It is noted that, in spite of those findings, Ms. Laureano has not been located, no criminal proceedings have been instituted and her family has not been compensated.

6.1 By submission of 6 September 1993, the State party argues that the Committee has no competence to consider the case, which is already under examination by the United Nations Working Group on Enforced or Involuntary Disappearances. In this context, the State party invokes article 5, paragraph 2 (a), of the Optional Protocol.

6.2 In reply, counsel points out that the Working Group on Enforced or Involuntary Disappearances has a specific mandate, i.e., to examine allegations relevant to the phenomenon of disappearances, receiving information from Governments, non-governmental, intergovernmental or humanitarian organizations and other reliable sources and making general recommendations to the Commission on Human Rights. He argues that the Working Group's objectives are strictly humanitarian and its working methods are based on discretion; it does not identify those responsible for disappearances and does not deliver a judgement in a case, which, to counsel, is an essential element of a "procedure of international investigation or settlement". He concludes that a procedure limited to the general human rights situation in a particular country, which does not provide for a decision on the specific allegations made in a particular case or for an effective remedy for the alleged violations, does not constitute a procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.

The Committee's admissibility decision

7.1 The Committee considered the admissibility of the communication during its fifty-first session. As to the State party's argument that the case is inadmissible because it is pending before the Working Group on Enforced or Involuntary Disappearances, it observed that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Economic and Social Council, and whose mandates are to examine and publicly report on human rights situations in specific countries or territories, or on major phenomena of

human rights violations worldwide, do not, as the State party should be aware, constitute a procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. The Committee recalled that the study of human rights problems of a more global character, although it might refer to or draw on information concerning individuals, could not be seen as being the same matter as the examination of individual cases within the meaning of article 5, paragraph 2 (a), of the Protocol. Accordingly, the Committee considered that the fact that Ms. Laureano's case was registered before the Working Group on Enforced or Involuntary Disappearances did not make it inadmissible under that provision.

7.2 Concerning the requirement of exhaustion of domestic remedies, the Committee noted that the State party had not provided any information on the availability and effectiveness of domestic remedies in the present case. On the basis of the information before it, it concluded that no effective remedies existed which the author should pursue on behalf of his granddaughter. The Committee therefore was not barred by article 5, paragraph 2 (b), of the Optional Protocol from considering the communication.

7.3 On 4 July 1994, the Committee declared the communication admissible. The State party was requested, in particular, to provide detailed information on what investigations had been carried out by the judicial authorities as a result of the author's application for habeas corpus, and what investigations are now being conducted with regard to the finding of the judge on the court of first instance in Huacho that military personnel were involved in the abduction of Ms. Laureano. The State party was further requested to provide the Committee with all court documents relevant to the case.

Examination of the merits

8.1 The deadline for the receipt of the State party's information under article 4, paragraph 2, of the Optional Protocol was 11 February 1995. No information about the results, if any, of further investigations in the case, and no court documents have been received from the State party, in spite of a reminder addressed to it on 25 September 1995. As of 1 March 1996, no further information on the status of the case had been received.

8.2 The Committee regrets the absence of cooperation on the part of the State party in respect of the merits of the communication. It is implicit in article 4, paragraph 2, of the Optional Protocol that a State party investigate thoroughly, in good faith and within the imparted deadlines, all the allegations of violations of the Covenant made against it, and make available to the Committee all the information at its disposal. In the instant case, the State party has not furnished any information other than that Ms. Laureano's disappearance is being investigated. In the circumstances, due weight must be given to the author's allegations, to the effect that they have been substantiated.

8.3 In respect of the alleged violation of article 6, paragraph 1, of the Covenant, the Committee recalls its general comment No. 6 (16) on article 6,[8] which states, inter alia, that States parties should take measures not only to prevent and punish deprivation of life by criminal acts but also to prevent arbitrary killing by their own security forces. States parties should also take

specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate and impartial body, cases of missing and disappeared persons in circumstances which may involve violation of the right to life.

8.4 In the instant case, the Committee notes that the State party concedes that Ms. Laureano has remained unaccounted for since the night of 13 August 1992 and does not deny that military or special police units in Huaura or Huacho may have been responsible for her disappearance, a conclusion reached, inter alia, by a judge on the civil court in Huacho. No material evidence has been advanced to support the State party's contention that a unit of Shining Path may have been responsible for her abduction. In the circumstances of the case, the Committee finds that Ana R. Celis Laureano's right to life, enshrined in article 6 of the Covenant, read together with article 2, paragraph 1, has not been effectively protected by the State party. The Committee recalls in particular that the victim had previously been arrested and detained by the Peruvian military on charges of collaboration with Shining Path and that the life of Ms. Laureano and of members of her family had previously been threatened by a captain of the military base at Ambar, who in fact confirmed to Ms. Laureano's grandmother that Ana R. Celis Laureano had already been killed.

8.5 With regard to the claim under article 7 of the Covenant, the Committee recalls that Ms. Laureano disappeared and had no contact with her family or, on the basis of the information available to the Committee, with the outside world. In the circumstances, the Committee concludes that the abduction and disappearance of the victim and prevention of contact with her family and with the outside world constitute cruel and inhuman treatment, in violation of article 7, juncto article 2, paragraph 1, of the Covenant.

8.6 The author has alleged a violation of article 9, paragraph 1, of the Covenant. The evidence before the Committee reveals that Ms. Laureano was violently removed from her home by armed State agents on 13 August 1992; it is uncontested that those men did not act on the basis of an arrest warrant or on orders of a judge or judicial officer. Furthermore, the State party has ignored the Committee's requests for information about the results of the author's petition for habeas corpus, filed on behalf of Ana R. Celis Laureano. The Committee finally recalls that Ms. Laureano had been provisionally released into the custody of her grandfather by decision of 5 August 1992 of a judge on the Civil Court of Huacho, i.e., only eight days before her disappearance. It concludes that, in the circumstances, there has been a violation of article 9, paragraph 1, juncto article 2, paragraph 1.

8.7 The author has claimed a violation of article 24, paragraph 1 of the Covenant, as the State party failed to protect his granddaughter's status as a minor. The Committee notes that during the investigations initiated after Ms. Laureano's initial detention by the military, in June 1992, the judge on the civil court of Huacho ordered her provisional release because she was a minor. However, subsequent to her disappearance in August 1992, the State party did not adopt any particular measures to investigate her disappearance and determined her whereabouts to ensure her security and welfare, given that Ms. Laureano was under age at the time of her disappearance. It concludes that, in the circumstances, Ms. Laureano did not benefit from such special measures of

protection as she was entitled to because of her status as a minor, and that there has been a violation of article 24, paragraph 1.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee reveal violations of articles 6, paragraph 1; 7; and 9, paragraph 1, all juncto article 2, paragraph 1; and of article 24, paragraph 1, of the Covenant.

10. Under article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the victim and the author with an effective remedy. The Committee urges the State party to open a proper investigation into the disappearance of Ana Rosario Celis Laureano and her fate, to provide for appropriate compensation to the victim and her family, and to bring to justice those responsible for her disappearance, notwithstanding any domestic amnesty legislation to the contrary.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] Established by the Commission on Human Rights in its resolution 20 (XXXVI) of 29 February 1980.

[b] See Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V.

[c] That statement, contained in a deposition made by the victim's grandmother on 30 September 1992, indicated in graphic terms that Celis Laureano had in fact been eliminated.

Q. Communication No. 542/1993, Katombe L. Tshishimbi v. Zaire (views adopted on 25 March 1996, fifty-sixth session)

Submitted by: Mrs. Agnès N'Goya [represented by counsel]

Victim: Her husband, Katombe L. Tshishimbi

State party: Zaire

Date of communication: 21 April 1993 (initial submission)

Date of decision on admissibility: 16 March 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1996,

Having concluded its consideration of communication No. 542/1993, submitted to the Human Rights Committee by Mrs. Agnès N'Goya, on behalf of her husband, Katombe L. Tshishimbi, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, her counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Agnès N'Goya, a Zairian citizen, born in 1946 and currently domiciled in Brussels. She submits the communication on behalf of her husband, Katombe L. Tshishimbi, a Zairian citizen, born in 1936 in Likasi, Province of Shaba, Zaire. Mr. Tshishimbi was abducted on 28 March 1993, and his whereabouts cannot be ascertained. The author is represented by counsel, who alleges violations by Zaire of articles 2; 3; 5; 7; 9; 12, paragraph 1; 17; 18; 19; 20, paragraph 2; and 25 of the International Covenant on Civil and Political Rights.

The facts as presented by counsel

2.1 Katombe Tshishimbi is a career military officer. In 1973, he was stripped of all his functions and sentenced by a military tribunal to 10 years' imprisonment for his refusal to obey orders. The court's sentence was later reduced to four years, two of which he spent in detention. On an unspecified subsequent date, he allegedly participated in a failed coup against President Mobutu Sese Seko.

2.2 From the late 1970s onwards, Mr. Tshishimbi sympathized with the principal movement of the political opposition to President Mobutu, the Union for Democracy and Social Progress (Union pour la Démocratie et le Progrès Social - UDPS). After UDPS leader Etienne Tshisekedi had been nominated for Prime Minister by the National Sovereign Conference (Conférence Nationale Souveraine) in 1992, he appointed Mr. Tshishimbi as his military adviser. It appears that Mr. Tshishimbi was used primarily as one of Mr. Tshisekedi's bodyguards.

2.3 Counsel recalls that after the Government of Etienne Tshisekedi took office, the Prime Minister, his Cabinet and his special advisers were subjected to constant surveillance, and at times harassment and bullying, from the military and especially members of the special presidential division (Division Spéciale Présidentielle - DSP), which generally remained loyal to President Mobutu. Detachments of DSP and paramilitary groups generally known as 'owls' (Hiboux) circulating in unmarked vehicles have arbitrarily arrested opponents of the President, kidnapped them, extorted money, ransacked their homes and so forth. It is submitted that anyone who openly supports the process of democratic reform in Zaire lives in constant insecurity, especially in Kinshasa.

2.4 It was in this context that Mr. Tshishimbi was abducted during the night of 28 March 1993; Belgian press reports of 6 April 1993 mention that he had been arrested ("aurait été arrêté"). The exact circumstances of his abduction, which occurred after he had left the residence of Mr. Tshisekedi for his home, remain unknown. After his abduction, his family, relatives and colleagues remained without news from him. It was believed - as noted in Belgian newspaper reports of 21 April 1993 - that he is/was detained at the headquarters of the National Intelligence Service, where ill-treatment of detainees is said to be common.

2.5 Counsel does not indicate whether any steps have been taken in Kinshasa to pursue domestic remedies in respect of the abduction of Mr. Tshishimbi. It is apparent, however, that counsel and Mrs. N'Goya consider the resort to such remedies to be futile, given in particular the absence of reliable information about the whereabouts of Mr. Tshishimbi.

The complaint

3.1 It is submitted that the facts as described reveal violations by Zaire of articles 2; 3; 5; 7; 9; 12, paragraph 1; 17; 18; 19; 20, paragraph 2; and 25 of the Covenant.

3.2 As the whereabouts of Mr. Tshishimbi remain unknown, counsel requests the application of interim measures of protection, pursuant to rule 86 of the Committee's rules of procedure.

Admissibility considerations

4.1 On 21 May 1993, the communication was transmitted to the State party under rule 91 of the Committee's rules of procedure. The State party was requested to clarify the circumstances of Mr. Tshishimbi's abduction, to investigate the author's allegations and to provide information about Mr. Tshishimbi's whereabouts and state of health. Under rule 86 of the rules of procedure, the State party was further requested to avoid any action which might cause irreparable harm to the alleged victim.

4.2 The State party did not submit any information on the case within the imparted deadlines. On 11 November 1993, the file was retransmitted to the Zairian authorities, after a representative of the UDPS who had contacted the Committee's secretariat had expressed doubts about the reliability of postal communications between Switzerland and Zaire. No reply to the second transmittal of the file was received from the State party.

4.3 The Committee considered the admissibility of the communication during its fifty-third session. It expressed concern at the absence of cooperation on the part of the State party; that was a matter of concern especially in the light of the request under rule 86 of the rules of procedure which had been issued by the Committee's Special Rapporteur on new communications. In the circumstances, due weight had to be given to the author's allegations, to the extent that they were sufficiently substantiated.

4.4 It was uncontested that Mr. Tshishimbi had been apprehended and brought to an unknown location during the night of 28 March 1993. It had also transpired that no domestic remedies had been pursued in Zaire to secure his release. On the other hand, the State party had been requested to provide specific information about effective remedies available to the author in the circumstances of the case. In the absence of State party cooperation on the issue, and given Mr. Tshishimbi's situation, including the impossibility for his family to have access to him or to obtain reliable information about his whereabouts and state of health, the Committee was satisfied that it was not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining the communication.

4.5 Concerning the author's allegations under articles 3; 5; 12, paragraph 1; 17; 18; 19; 20, paragraph 2; and 25 of the Covenant, the Committee observed that they were general and unsubstantiated. Nothing in the file indicated that Mr. Tshishimbi had been subjected to arbitrary interference with his privacy (article 17), denied his freedom of conscience and religion (article 18), his right to freedom of expression (article 19) or his right to political participation (article 25). In this respect, therefore, no claim under the Optional Protocol had been advanced.

4.6 The Committee considered that the author's allegations under articles 7 and 9 could not, given the circumstances of Mr. Tshishimbi's abduction, be further substantiated at that stage and that they should be considered on their merits.

4.7 On 16 March 1995, therefore, the Committee declared the communication admissible insofar as it appeared to raise issues under articles 7 and 9 of the Covenant. It reiterated its request to the State party to provide detailed information on the whereabouts of Mr. Tshishimbi and to indicate whether he was covered by the terms of the amnesty announced by the State party's new government in the summer of 1994.

Examination of the merits

5.1 The deadline for the State party's information and observations under article 4, paragraph 2, of the Optional Protocol was 9 November 1995. No information has been received from the State party, in spite of a reminder addressed to it on 27 November 1995.

5.2 The Committee must therefore consider the present communication in the light of the material made available to it by the author. It notes with serious concern the total absence of cooperation on the part of the State party. It is implicit in article 4, paragraph 2, of the Optional Protocol that a State party make available to the Committee, in good faith and within the imparted deadlines, all the information at its disposal. This the State party has failed

to do, in spite of reminders addressed to it. It has further failed to react to the request for interim measures of protection formulated by the Committee's Special Rapporteur on new communications in May 1993. As of 1 March 1996, no information on the fate of Mr. Tshishimbi had been forwarded to the Committee.

5.3 The author has alleged a violation of article 9 of the Covenant. While there is no evidence that Mr. Tshishimbi was actually arrested or detained during the night of 28 March 1993, the Committee recalls that the State party was requested, in the decision on admissibility, to clarify this issue; it has not done so.

5.4 The first sentence of article 9, paragraph 1, guarantees to everyone the right to liberty and security of person. In its prior jurisprudence, the Committee has held that this right may be invoked not only in the context of arrest and detention, and that an interpretation which would allow States parties to tolerate, condone or ignore threats made by persons in authority to the personal liberty and security of non-detained individuals within the State party's jurisdiction would render ineffective the guarantees of the Covenant.[a] In the circumstances of the present case, the Committee concludes that the State party has failed to ensure Mr. Tshishimbi's right to liberty and security of person, in violation of article 9, paragraph 1, of the Covenant.

5.5 With regard to the claim under article 7, the Committee recalls that Mr. Tshishimbi was abducted under circumstances that have not been clarified and has had no contact with his family or, on the basis of the information available to the Committee, with the outside world since his abduction. Furthermore, the State party has consistently ignored the Committee's requests for information regarding Mr. Tshishimbi's abduction and whereabouts. In the circumstances, the Committee concludes that the removal of the victim and the prevention of contact with his family and with the outside world constitute cruel and inhuman treatment, in violation of article 7 of the Covenant.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee reveal violations by Zaire of articles 7 and 9, paragraph 1, of the Covenant.

7. Under article 2, paragraph 3 (a), of the Covenant, the State party is under a duty to provide the author and the victim with an appropriate remedy. The Committee urges the State party: (a) to investigate thoroughly the circumstances of Mr. Tshishimbi's abduction and unlawful detention; (b) to bring to justice those responsible for his abduction and unlawful detention; and (c) to grant adequate compensation to him and to his family for the violations of his rights for which he has suffered. The State party is under an obligation to ensure that similar violations do not occur in the future.

8. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the

State party, within 90 days of the transmittal to it of the present decision, information about the measures taken to give effect to its views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] See, for example, Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40 (A/49/40), vol. II, annex IX. W, communication No. 449/1991 (Mojica v. the Dominican Republic), views adopted on 15 July 1994, para. 5.4; and annex IX.BB, communication No. 468/1991 (Oló Bahamonde v. Equatorial Guinea), views adopted on 20 October 1993, para. 9.2.

R. Communication No. 546/1993, Rickly Burrell v. Jamaica (views adopted on 18 July 1996, fifty-seventh session)*

Submitted by: Philip Leach

Victim: Rickly Burrell

State party: Jamaica

Date of communication: 28 April 1993 (initial submission)

Date of decision on admissibility: 4 April 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 1996,

Having concluded its consideration of communication No. 546/1993, submitted to the Human Rights Committee on behalf of Mr. Rickly Burrell under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The communication is submitted by Mr. Philip Leach, a solicitor in London, on behalf of Mr. Rickly Burrell, a Jamaican citizen, at the time of submission of the communication awaiting execution at St. Catherine District Prison, Jamaica, and subsequently killed during a prison disturbance. Mr. Burrell is said to be a victim of violations by Jamaica of articles 6; 7; 9, paragraphs 2, 3 and 4; 10; 14, paragraphs 1, 3 (b), (c), (d) and (e), and 5; and 17, paragraph 1, of the International Covenant on Civil and Political Rights.

The facts as submitted

2.1 In the initial communication, dated 28 April 1993, counsel states that Mr. Burrell was accused of the murder on 11 July 1987 of Wilbert Wilson. He was convicted and sentenced to death in the St. James Circuit Court on 26 July 1988. His application for leave to appeal was heard by the Jamaican Court of Appeal on 23 July 1990 and dismissed on 24 September 1990. The Judicial Committee of the Privy Council denied him special leave to appeal on 10 February 1993. With this, it is submitted, domestic remedies have been exhausted.

2.2 The case for the prosecution was that, on 11 July 1987, at about 11.30 p.m., Mr. Burrell and his two co-accused, after having robbed several people, entered Black Shop in the parish of St. James. Mr. Burrell carried two guns; he first fired at the shop assistant, Rick Taylor, who was hit in his left

* Pursuant to rule 85 of the rules of procedure, Committee member Laurel Francis did not participate in the examination of the communication.

thigh, and then at Wilbert Wilson, who died as a result of the gunshot. Mr. Burrell's co-accused, who were said to have been on the lookout at the time the shots were fired, were convicted of manslaughter.

2.3 The prosecution relied on the testimony of three eyewitnesses, who had known Mr. Burrell for some years and who identified each of the accused on separate identification parades held on 18 September 1987. Mr. Burrell's defence was based on an alibi. He testified that he was at home on the night of the murder.

2.4 It is stated that after the arrest, on the way to the police station, the truck in which Mr. Burrell and about 26 other men were being transported stopped at the locus in quo, where they were seen by a number of people. Mr. Burrell was then taken to the police station and detained in a cell together with 14 other men. He states that he was detained for about two months without being charged. It is further stated that on the day the identification parade was due to take place, Mr. Burrell was released from his cell to have a meal. He talked to several persons, whom he assumed to be visitors. The identification parade was then postponed and held one week later. Counsel claims that the persons brought in to identify Mr. Burrell were the ones he had met the week before.

2.5 In a further submission, dated 14 February 1994, counsel informs the Committee that Mr. Burrell was killed in St. Catherine District Prison on 31 October 1993. Counsel requests the Committee to examine the circumstances of his death in respect of a possible violation of article 6, paragraph 1, of the Covenant.

2.6 Counsel refers to a press release by Amnesty International, reporting that four death-row prisoners, among them Rickly Burrell, were killed during a disturbance in St. Catherine Prison. Reports indicated that the prisoners were shot dead after they tried to take prison guards hostage. However, prior to the incident, some prisoners had been receiving death threats from prison personnel because they had complained about maltreatment.

2.7 Counsel states that, on 25 November 1993, he wrote to the Jamaican parliamentary ombudsman requesting confirmation of Mr. Burrell's death and calling for an official investigation. A copy of the letter was sent to the superintendent in charge of St. Catherine Prison and to the London solicitors of the Jamaican Government. No reply was received from either the ombudsman or the superintendent; the solicitors replied that they had no information about the incident.

2.8 On 5 January 1994, Amnesty International published a report about the incident following its investigation in Jamaica conducted in November 1993. Counsel includes the report as part of his submission. According to the report, the prisoners were killed on the first floor of Gibraltar Block, where death-row prisoners are held. The circumstances of the incident remain unclear, but prison authorities contend that two warders were taken hostage while they were serving the prisoners lunch at around 12.30 p.m. It is also contended that three warders were injured during the incident, and that the throat of one was cut with a knife, but none of the warders were hospitalized and the injuries appear to have been minor. Apart from the one knife, none of the prisoners was armed. Alarm apparently was quickly raised, back-up warders appeared and the

prisoners were shot. At least three other inmates were wounded and had to be hospitalized.

2.9 Eyewitnesses among the prisoners submit that the incident started on the ground floor when an inmate was beaten by a warder during an argument, after which the prisoner ran upstairs. They further state that the four prisoners were shot in their cells when they no longer posed a threat to the warders. It is also contended that warders shot at other inmates through the bars of their cells and that some of them were beaten. It is stated that the injuries of the surviving inmates are consistent with those claims and that one warder has testified that he interfered to save one prisoner from being severely beaten. It is further claimed that, because of the confined space, it is difficult to see how prisoners could have been shot without injuring the warders, if they were still being held hostage. It is further stated that at least three of the warders named by prisoners as having been involved in the shootings have been named repeatedly in other allegations involving threats to or maltreatment of prisoners on death row.

2.10 It is submitted that warders are normally armed only with batons but that there is an armoury just inside the gate-lodge of the prison. It remains unclear who authorized the use of arms on 31 October 1993, which was a Sunday, when the superintendent was not present. It is submitted that although prison officers receive training in the use of firearms, they do not receive training in physical self-defence or control-and-restraint techniques or in the use of different levels of force.

2.11 Counsel submits that, although the state pathologist had carried out autopsies and a police investigation took place, no report has been made available.

2.12 Counsel contends that many incidents of excessive violence by prison warders have occurred in the past years and that complaints are not adequately dealt with but that, on the contrary, prisoners who complain about maltreatment are subjected to threats by warders. If investigations are held, the results are not made public. It is further submitted that the parliamentary ombudsman, although constituting the main independent procedure for investigation of complaints from inmates, has no powers of enforcement and his recommendations are not binding. Counsel points out that the last annual report from the ombudsman to Parliament dates from 1988.

2.13 Counsel submits that he has received a letter from an inmate explaining the circumstances under which Mr. Burrell was killed. According to the letter, Mr. Burrell had been threatened with death by a warder whose relative Mr. Burrell was convicted of having murdered and Mr. Burrell had consequently lodged a complaint with the superintendent. The letter states that the incident on 31 October 1993 was started by the same warder and that that warder shot and killed Mr. Burrell, who was in his cell, "in cold blood". Counsel states that other letters from inmates also mention the same warder as being involved.

The complaint

3.1 Counsel claims that Mr. Burrell's detention for over two months without being charged amounts to a violation of article 9, paragraphs 2, 3, and 4, of the Covenant.

3.2 It is contended that Mr. Burrell's legal aid lawyer did not raise the irregularities in respect of Mr. Burrell's identification in the Court of Appeal. It is submitted that the lawyer never contacted Mr. Burrell despite numerous efforts on Mr. Burrell's part to get an appointment. Moreover, at the hearing before the Court of Appeal, the lawyer remarked that he could not support his client's application for leave to appeal. He conceded that the trial judge had adequately directed the jury on the issue of identification and that, in the light of the positive identification evidence of three eyewitnesses, he could advance no arguable ground of appeal in his client's favour. It is stated that, because of counsel's failure to adequately represent Mr. Burrell, relatives who could have supported his alibi were not called to the Court of Appeal to testify on his behalf. It is argued that the above amounts to a violation of article 14, paragraphs 1, 3 (b), (c), (d) and (e) and 5, of the Covenant. It is further submitted that a delay of two years and two months between conviction and dismissal of appeal amounts to a violation of article 14, paragraph 3 (c).

3.3 Counsel further claims that the frequent delays in correspondence sent from St. Catherine District Prison and in the receipt of letters at the prison, if they arrived at all, made it extremely difficult to obtain instructions from his client and to represent him adequately. The presumed interference with the mail by prison authorities is said to constitute a violation of article 17 of the Covenant.

3.4 Counsel claims that because Mr. Burrell was threatened and ill-treated by warders at St. Catherine Prison, the State party has violated articles 7 and 10 of the Covenant. It is further alleged that Mr. Burrell's death constitutes a violation of article 6, paragraph 1, of the Covenant. In this context, counsel refers to the Committee's prior jurisprudence[a] and submits that there is a prima facie case that Mr. Burrell was arbitrarily deprived of his life by the authorities of the State and that the law in Jamaica fails strictly to control and limit circumstances in which a person may be deprived of his life. It is submitted that in view of the evidence, the burden of proof now lies with the State to refute that article 6 has been breached. In this context, counsel submits that the State party has sole access to the most significant information, such as the autopsy reports.

3.5 It is also submitted that the warders who killed Mr. Burrell either had the intent to kill him or acted negligently or recklessly as to whether he would be killed; in this connection, it is argued that the shooting was not necessary in the particular circumstances and not proportional to the requirements of law enforcement. Counsel claims that no warnings were given to Mr. Burrell or to the three other inmates who were shot.

3.6 It is argued that the State party failed to take adequate measures to protect Mr. Burrell's life while he was held in custody. In this context, reference is made to a series of previously reported abuses and killings with

regard to which no proper investigations were conducted by the State party, to the lack of training received by warders in restraint techniques and the use of different levels of force, and to the ready access warders have to weapons. Counsel also refers to international norms with regard to the use of force.

3.7 Counsel submits that the State party is under a duty to make a full and thorough inquiry into the allegations, bring to justice any person found to be responsible for Mr. Burrell's death and pay compensation to Mr. Burrell's family.

3.8 It is stated that the same matter has not been submitted to another procedure of international investigation or settlement.

The State party's observations on admissibility and counsel's comments

4.1 By submission of 22 July 1994, the State party provides a copy of a report, dated 15 May 1994, from Senior Inspector B. R. Newman about the circumstances of Mr. Burrell's death. The report states that Mr. Burrell occupied cell No. 10 at Gibraltar 1 in St. Catherine Prison. Gibraltar Block is a two-story building divided into four sections, each section containing about 26 cells without any functioning sanitary facilities. Each section is supervised by a different team of warders. Sanitary facilities are found in the yard. Inmates are unlocked, five at a time, to use those facilities and to exercise and also for meals.

4.2 The report states that on 31 October 1993, the serving of lunch was at its final stage by about 12.30 p.m. Some inmates, including Mr. Burrell, were still in the passage of Gibraltar 1 and the four warders on duty were engaged in locking them in their cells. Unknown to them, an altercation between two inmates from Gibraltar 2 and the members of a patrol party had occurred in the yard. Those inmates suddenly rushed from outside into the passage and overpowered the warders. The report states that other inmates, including Mr. Burrell, joined them in relieving the warders of their batons and keys and in opening some of the cells. The warders were dragged into cells 9 and 10, where they were assaulted. Other warders quickly appeared on the scene and ordered the inmates to release their hostages. The inmates reportedly refused, whereupon shots were fired. The injured warders and inmates were taken to Spanish Town Hospital, where Mr. Burrell and three other inmates were pronounced dead.

4.3 The State party states that the post-mortem report shows that Mr. Burrell died as a result of shotgun and blunt force injuries. It is also stated that, according to eyewitnesses, the shooting continued after the warders were rescued.

4.4 The State party submits that it is evident that the death of Rickly Burrell was the sequel to altercations between two death-row prisoners from Gibraltar 2 and certain warders of the patrol party. The State party states that it appears that Mr. Burrell was not aware of that incident, which seems to have ignited hostile reactions in the inmates, who then turned against the four warders in Gibraltar 1. The State party submits that the warders were in serious danger, since one of the prisoners tried to cut a warder's throat and others tried to hang a warder by a towel. The State party submits that the other warders, apparently after having ordered the inmates to release their colleagues,

panicked upon realizing that their colleagues were in danger of losing their lives and opened fire. The State party submits that the use of necessary force may have been justified under section 15 (3) of the Corrections Act (1985), which reads: "Every correctional officer may use force against any inmate using violence to any person, if such officer has reasonable grounds to believe that such a person is in danger of life or limb, or that other grievous bodily hurt is likely to be caused by him." In this context, the State party submits that, although none of the warders was hospitalized, two of them were rendered unfit for work for two months as a result of the injuries received. One of them is said to have a long scar at his throat, where an inmate cut him. The State party concludes: "Like Burrell, none of these four warders was involved in the commencement of the altercation, but became victims. For Burrell, it was fatal."

5.1 In his comments on the State party's submission, counsel points out that the State party has failed to indicate what role Mr. Burrell played in the incident which led to his death. In this context, counsel notes that only one of the three warders refers to Mr. Burrell in his statement, saying that he was among the inmates who pushed him into the cell. In Inspector Newman's report it is stated that Mr. Burrell joined in with the others who were trying to overpower the warders. No further reference to Mr. Burrell's conduct is made. Counsel further notes that the inspector's report was drawn up more than six months after the incident and that the only disclosed sources of information are statements by three of the four warders who were kept in the cell by the inmates, although it seems that other sources were also used. In particular, counsel asserts that no statement has been submitted from the fourth warder involved in the incident and from the staff warder who was in charge on 31 October 1993. Nor have statements been taken from any of the warders who came to their colleagues' rescue.

5.2 As to the cause of Mr. Burrell's death, counsel notes that the pathologist's report, of which the State party has provided no copy, states that he died of shotgun and blunt force injuries, but that the State party has given no details as to how Mr. Burrell was killed. Counsel notes that the inspector's report states that warders panicked and opened fire; he argues that if Mr. Burrell's death resulted from this, it would constitute a violation of article 6 of the Covenant. Furthermore, counsel submits that if the State party contends that Mr. Burrell was shot to prevent further injuries to the warders in the cell, the pathologist's evidence would suggest that he was beaten to death after there was no longer any danger, in flagrant breach of article 6 of the Covenant.

5.3 Counsel further submits that there is evidence which indicates that Mr. Burrell was not shot to prevent injury to the warders in the cell, but that he was shot after there was no more threat. In this context, counsel refers to statements from inmates and to press articles. He claims that relatives of some of the prisoners killed saw that the shot wounds were at the back of the body and that the body showed signs of heavy beating. Inmates who survived further allege that they were brutally assaulted by the warders and shot at after the four warders were released. It is also alleged that the supervisor told the investigating police that he had not been consulted about the use of guns and that the warders had taken the guns without his permission. Finally, counsel also refers to the report of Amnesty International, in which it was stated that

it was difficult to see how the inmates could have been shot dead in such a confined space without warders also being injured if they were still being held at that time.

5.4 Counsel also submits that the regulations for the use of force would have required the use of non-lethal force.

5.5 Counsel further notes that the inspector's report suggests that the warders did not obtain the consent of the senior officer before fetching firearms. Counsel refers to article 2 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, which requires a clear chain of command over all officials authorized by law to use force and firearms. Counsel argues that the incident of 31 October 1993 and previous incidents at St. Catherine District Prison show that there was no such clear chain of command or that it was utterly ineffective. In this context, counsel also argues that if the warders had received proper training in control and restraint techniques, they might not have panicked and shot Mr. Burrell and three other inmates.

5.6 Counsel argues that the State party's investigation falls short of its obligations under the Covenant. In this context, he notes that he has never received a reply from the parliamentary ombudsman, that the report of the forensic pathologist has not been submitted to the Committee and that the State party does not refer to the coroner's inquest, although section 79 of the Corrections Act (1985) requires that a coroner's inquest be held on the death of any inmate in a correctional institution. Counsel refers to the Committee's jurisprudence in the Uruguayan cases and argues that the State party is under the obligation to make a full and thorough inquiry.

5.7 Finally, counsel refers to a letter dated 16 June 1994 from the Jamaican Ministry of National Security and Justice to Amnesty International, in which the Ministry states that the inspector's report on the incident of October 1993 has been referred to the Director of Public Prosecutions for a ruling on the question of criminal responsibility and that it is not considered necessary to set up an independent commission of inquiry. In this connection, counsel notes with concern that the Director of Public Prosecutions has not yet made a decision in relation to a report concerning disturbances in 1991.

The Committee's decision on admissibility

6.1 The Committee considered the admissibility of the communication at its fifty-third session.

6.2 The Committee noted that the State party, in its observations, had described the events leading to Mr. Burrell's death but had not responded to the complaints under articles 9, 14 and 17 of the Covenant or raised any objections to the admissibility of the communication. Nevertheless, the Committee had to ascertain whether all the admissibility criteria laid down in the Optional Protocol had been met.

6.3 The Committee noted that counsel had continued to represent Mr. Burrell after his death and that he had indicated that he had been instructed to do so by the Jamaica Council for Human Rights, which had been in contact with

Mr. Burrell's family. In the circumstances, the Committee considered that counsel had sufficiently justified his authority to submit and maintain the communication.

6.4 The Committee noted that counsel had claimed that Mr. Burrell was held in detention for two months before being charged but that counsel had failed to provide any information in corroboration. The Committee considered therefore that counsel had failed to substantiate, for purposes of admissibility, his claim that article 9 of the Covenant had been violated in Mr. Burrell's case. That part of the communication was thus inadmissible under article 2 of the Optional Protocol.

6.5 With regard to the claim that the interference with the mail in St. Catherine District Prison violated Mr. Burrell's rights under article 17 of the Covenant, the Committee considered that counsel had failed to show what steps were taken to bring that complaint to the attention of the authorities in Jamaica. In this respect, the communication did not fulfil the requirement of exhaustion of domestic remedies set out in article 5, paragraph 2 (b), of the Optional Protocol.

6.6 With regard to the claim concerning Mr. Burrell's appeal, the Committee considered that whether, in the particular circumstances of the case, the delay of two years between conviction and the dismissal of the appeal by the Jamaican Court of Appeal constituted undue delay, in violation of article 14, paragraph 3 (c), juncto paragraph 5, of the Covenant, was a question which should be examined on the merits.

6.7 With regard to the claim that Mr. Burrell's representation on appeal was inadequate, the Committee considered that that might raise issues under article 14, in particular paragraphs 3 (b) and 5, of the Covenant, which should be examined on the merits.

6.8 The Committee then turned to the issue of the circumstances of Mr. Burrell's death, raised by counsel after his initial communication. It notes that the State party had forwarded its observations with regard to Mr. Burrell's death and that it had not raised any objections to admissibility of that part of the communication. In particular, the State party had not indicated domestic remedies that Mr. Burrell's family would still be required to exhaust. In the circumstances, the Committee considered that it was not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining whether the circumstances of Mr. Burrell's death might raise issues under articles 6, 7 and 10 of the Covenant.

7. Accordingly, the Human Rights Committee decided that the communication was admissible insofar as it might raise issues under articles 6, paragraph 1; 7; 10, paragraph 1; and 14, paragraphs 3 (b), (c), and 5, of the Covenant.

Further submissions from counsel

8.1 By letter of 5 July 1995, counsel informs the Committee that the Office of the Parliamentary Ombudsman in Jamaica has informed him that the Director of Public Prosecution has ruled that the coroner of the parish of St. Catherine hold an inquest into Mr. Burrell's death.

8.2 By letter of 6 October 1995, counsel informs the Committee that he has been notified that the coroner's inquest will commence on 6 November 1995.

Issues and proceedings before the Committee

9.1 The Committee has considered the communication in the light of all the information provided by the parties. It notes with concern that following the transmittal of the Committee's decision on admissibility, no further information has been received from the State party clarifying the matter raised by the present communication. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that a State party examine in good faith all the allegations brought against it and that it provide the Committee with all the information at its disposal. In the light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the allegations submitted on behalf of Mr. Burrell, to the extent that they have been substantiated.

9.2 As regards the claim that the period of two years between Mr. Burrell's conviction and the appeal hearing constituted undue delay, the Committee considers that the information before it does not allow it, in the present case, to make a finding as to whether or not the delay was in violation of article 14, paragraph 3 (c) juncto paragraph 5, of the Covenant.

9.3 As regards the claim that Mr. Burrell's representation on appeal was inadequate, the Committee notes that it appears from the judgement of the Court of Appeal that Mr. Burrell's legal aid counsel for the appeal (who had not represented him at the trial) conceded at the hearing that there was no merit in the appeal. The Committee recalls its jurisprudence that under article 14 of the Covenant, the court should ensure that the conduct of a case by the lawyer is not incompatible with the interests of justice. While it is not for the Committee to question counsel's professional judgement, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the court must ensure that the accused is so informed and given an opportunity to engage other counsel. The Committee is of the opinion that in the instant case, Mr. Burrell should have been informed that his legal aid counsel was not going to argue any grounds in support of the appeal so that he could have considered any remaining options open to him. In the circumstances, the Committee finds that Mr. Burrell was not effectively represented on appeal, in violation of article 14, paragraph 3 (b) juncto 5.

9.4 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, when no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its general comment No. 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review [of conviction and sentence] by a higher tribunal".[d] In the present case, since the final sentence of death was passed without effective

representation for Mr. Burrell on appeal, there has consequently also been a violation of article 6 of the Covenant.

9.5 The Committee has carefully examined all information forwarded by both counsel and the State party in relation to Mr. Burrell's death following the hostage-taking of some warders in St. Catherine Prison's death row section, on 31 October 1993. It regrets that the State party has not made available the autopsy report or the results of the coroner's inquest in the case. The Committee notes that counsel has alleged, on the basis of letters received from other inmates in St. Catherine Prison, that Mr. Burrell was shot after the warders were already released and thus the need for force no longer existed. The Committee notes that the State party itself has acknowledged that Mr. Burrell's death was the unfortunate result of confusion on the side of the warders, who panicked when seeing some of their colleagues being threatened by the inmates, and that the report submitted by the State party acknowledges that the shooting continued after the warders were rescued. In the circumstances, the Committee concludes that the State party has failed to take effective measures to protect Mr. Burrell's life, in violation of article 6, paragraph 1, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 3 (b) juncto 5, and consequently of article 6, paragraph 2, and of article 6, paragraph 1, of the International Covenant on Civil and Political Rights.

11. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide an effective remedy for the violations of which Mr. Burrell became the victim. The Committee is of the opinion that in the circumstances of the case, that entails the payment of compensation to the family of Mr. Burrell. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex XI, communication No. 45/1979 (Guerrero v. Colombia), views adopted on 31 March 1982; and ibid., Fortieth Session, Supplement No. 40 (A/40/40), annex X, communications Nos. 146/1983 and 148-154/1983 (Baboeram et al. v. Suriname), views adopted on 4 April 1985.

[b] For example: Code of Conduct for Law Enforcement Officials (adopted by the General Assembly in resolution 34/169 of 17 December 1979); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Havana in 1990); and Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (annexed to Economic and Social Council resolution 1989/65 of 24 May 1989).

[c] See, inter alia, Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex X, communication No. 30/1978 (Bleier v. Uruguay), views adopted on 29 March 1982; and ibid., Thirty-eighth Session, Supplement No. 40 (A/38/40), annex IX, communication No. 84/1981 (Dermot Barbato v. Uruguay), views adopted on 21 October 1982.

[d] Ibid., Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, general comment No. 6 (16), para. 7.

S. Communication No. 563/1993, Nydia Bautista de Arellana v. Colombia (views adopted on 27 October 1995, fifty-fifth session)

Submitted by:	Federico Andreu (representing the family of Mrs. Nydia Erika Bautista de Arellana)
Victim:	Mrs. Nydia Erika Bautista de Arellana
State party:	Colombia
Date of communication:	14 June 1993 (initial submission)
Date of decision on admissibility:	11 October 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 October 1995,

Having concluded its consideration of communication No. 563/1993, submitted to the Human Rights Committee by Mr. Federico Andreu, representing the family of Mrs. Nydia Erika Bautista de Arellana, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Federico Andreu, a Colombian lawyer residing in Brussels. He is instructed by the relatives and the family of Nydia Erika Bautista de Arellana, a Colombian citizen who disappeared on 30 August 1987 and whose body was subsequently recovered. It is submitted that she is the victim of violations by Colombia of articles 2, paragraph 3; 6, paragraph 1; 7 and 14 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 On 25 August 1986, Nydia Erika Bautista de Arellana, a member of the 19 April Movement ("M-19"), was detained in Cali, Colombia, by a military unit of the Third Brigade. She was kept incommunicado for three weeks and allegedly tortured during that period. Upon signing a statement that she had been well treated during detention, she was released. Reference is made to other cases of forced disappearances of M-19 activists, both prior and subsequent to Nydia Bautista's arrest.

2.2 On 30 August 1987, Nydia Bautista was abducted from the family home in Bogotá. According to eyewitnesses, she was pulled into a Suzuki jeep by eight men, who were armed but dressed as civilians. An eyewitness identified the jeep's licence plate.

2.3 Mrs. Bautista's abduction was immediately brought to the attention of the local authorities by the Association of Solidarity with Political Prisoners. On 3 September 1987, her father filed a formal complaint with the Division of Human Rights of the Attorney-General's Office (Procudaría Delegada para los Derechos Humanos). Together with the Division's director, her father inquired about Nydia's whereabouts in various police and military offices, as well as with the intelligence services, to no avail. On 14 September 1987, an official in the Attorney-General's Office assigned to investigate the case recommended that the information he had obtained during the investigation should be sent to the competent judge.

2.4 On 25 September 1987, the case was referred to the Magistrate's Court No. 53. A preliminary hearing was held in November 1987. On 10 February 1988, the examining magistrate discontinued the proceedings and referred the case to the Technical Corps of the Judicial Police (Cuerpo Técnico de la Policía Judicial).

2.5 In the meantime, on 12 September 1987, the body of a woman had been found in the municipality of Guayabetal, Cundinamarca, Colombia. The death certificate, which had been drawn up before the body was buried in the cemetery of Guayabetal, indicated that it concerned a 35-year old woman "wearing a white dress with blue spots and a white handbag, blindfolded, the hands tied together, face mutilated". According to the autopsy, the deceased had been shot in the head. No other efforts were made to identify the body. On 14 September 1987, the mayor of Guayabetal gave the death certificate to the municipality's examining magistrate; on 8 October 1987, the latter started his own investigations in the case.

2.6 On 22 December 1987, the examining magistrate of Guayabetal referred the case to the district's section of the Technical Corps of the Judicial Police. On 30 June 1988, the chief of the preliminary inquiry unit of that authority ordered all potential witnesses to be heard. On 8 July 1988 he instructed the commander of the district's police force to take the necessary steps to clarify the events and to identify the perpetrators of the crime. Two police officers were assigned to carry out the investigations. On 17 August 1988, those two officers reported to the preliminary inquiry unit that they "had been unsuccessful in tracking the perpetrators or in establishing a motive for the crime, since the place where the body was discovered lent itself to the purpose of such offence ...". They were further unable to establish the victim's identity, as no fingerprints had been taken in September 1987, and concluded that the perpetrators and the victim came from another region, i.e. Bogotá or Villavivencio. The case was then suspended.

2.7 Early in 1990, Nydia Bautista's family learned about the unidentified woman buried in Guayabetal, whose known characteristics corresponded to those of Nydia. After much pressure from the family, the Special Investigations Division of the Attorney-General's Office on 16 May 1990 ordered the exhumation of the body, which was carried out on 26 July 1990. Nydia's sister identified the pieces of cloth, bag and earring and, on 11 September 1990, a detailed report of forensic experts confirmed that the remains were those of Nydia Bautista.

2.8 On 22 February 1991, a sergeant of the twentieth brigade of the military's intelligence and counter-intelligence unit, Bernardo Alfonso Garzón Garzón,

testified before the chief of the Special Investigations Division that Nydia Bautista had been abducted by members of the twentieth brigade, acting either with the consent or on order of the highest commanding officer, one (then) Colonel Alvaro Velandia Hurtado. He further revealed that Sergeant Ortega Araque drove the jeep in which Nydia Bautista was abducted, and added that she had been held for two days in a farm before taken to Quebradablanca, where she was killed.

2.9 Nydia Bautista's father filed a request for institution of disciplinary proceedings against those held to be responsible for the disappearance of his daughter. For a year thereafter, the family was kept unaware whether the Special Investigations Division or the Division of Human Rights had in fact initiated criminal or disciplinary proceedings in the case. Counsel for the family wrote numerous letters to the Minister for Defence and the Attorney-General, requesting information on the outcome of the investigations, if any, and on the status of the case before the courts. On 29 January 1992, a prosecutor in the Division of Human Rights informed him that the case had been referred back to the competent prosecutor's office, so as to complete investigations in the case. On 3 February 1992, the Secretary-General of the Ministry of Defence indicated that the case was not under investigation before the military courts.

2.10 Counsel argued that at the time of Nydia's abduction, her family could not file for amparo, as one of the requirements for a petition for amparo is that the petitioner must indicate where and by which authority the person is detained. The family was also unable to join the proceedings as a civil party, as the examining magistrates in charge of the case had referred it to the Technical Corps of the Judicial Police, where it was kept pending.

2.11 Counsel contends that the Colombian authorities displayed serious negligence in the handling of Nydia Bautista's case. He observes that the authorities at no time adequately investigated the events and that coordination between the different authorities involved was either poor or non-existent. Thus, once the chief of the Special Investigations Division was removed from office, no follow-up was given to the case, in spite of the testimony of Mr. Garzón Garzón. For several years, Nydia Bautista's family relied on non-governmental organizations to obtain information about any steps taken to prosecute the perpetrators. In this context, it is noted that in February 1992, a non-governmental organization received information to the effect that the case had been reopened, that disciplinary and criminal proceedings against Colonel Velandia Hurtado had started and that investigations into the alleged involvement of other people had also been initiated.

2.12 Finally, counsel notes that Nydia Bautista's family and he himself have received death threats and are subject to intimidation because of their insistence in pursuing the case.

The complaint

3. It is submitted that the facts outlined above amount to violations by Colombia of articles 2, paragraph 3; 6, paragraph 1; 7 and 14 of the Covenant.

The State party's admissibility information and observations

4.1 The State party submits that its authorities have been doing, and are doing, their utmost to bring to justice those held responsible for the disappearance and death of Nydia Bautista. It adds that available domestic remedies in the case have not been exhausted.

4.2 The state of disciplinary proceedings in the case is presented as follows:

- Disciplinary proceedings were first initiated by the Division of Special Prosecutions, Office of the Attorney-General (Procudaría General). That office appointed an investigator of the Judicial Police (Policía Judicial). When the net result of his investigations proved inconclusive, the case was placed before the ordinary tribunals.

- In 1990, the Special Investigations Division took up the case again, after the victim's body had been found. On 22 February 1991, that office heard the testimony of Mr. Garzón Garzón, then a member of the Colombian national army. According to the State party, his testimony could never be corroborated. The State party notes that Mr. Garzón Garzón's whereabouts are currently unknown[3].

- After that deposition, the Special Investigations Division sent three communications to Nydia Bautista's sister, to which no reply was given.

- Given the lack of evidence, the Division then filed the case, but nevertheless referred the file to the National Delegate for Human Rights (Delegado para los Derechos Humanos). That office examined the possibility of instituting disciplinary proceedings against Mr. Velandia Hurtado and Sergeant Ortega Araque, both of whom had been heavily implicated by Mr. Garzón Garzón's testimony.

4.3 The State party gives the following summary of so-called administrative proceedings in the case. On 24 July 1992, the Bautista family filed an administrative complaint against the Ministry of Defence, claiming compensation before the Administrative Tribunal of Cundinamarca. The case was registered under file No. 92D-8064, in compliance with article 86 of the Code of Administrative Procedure (Código Contencioso Administrativo). On 18 August 1992, the complaint was declared admissible and the Ministry presented oral replies to the charges on 3 November 1992. On 27 November 1992, the Administrative Tribunal ordered the gathering of further evidence; according to the State party, evidence is still being sought, more than 18 months after the order.

4.4 The State party affirms that measures will be taken to prevent the practice of forced disappearances. In particular, it notes that it is now considering the introduction of legislation punishing that crime under the Colombian Criminal Code.

The Committee's admissibility decision

5.1 The Committee examined the admissibility of the communication during its fifty-second session. With respect to the exhaustion of available domestic remedies, it noted that immediately after Mrs. Bautista's disappearance, her father had filed a complaint with the Division of Human Rights of the Attorney-General's Office. Recapitulating the chronology of events after the discovery of the victim's body and the activities of the various judicial bodies involved in the case, the Committee noted that more than seven years after the victim's disappearance, no criminal proceedings had been instituted, nor had those responsible for Mrs. Bautista's disappearance been identified, arrested or tried. The Committee deemed the delay in the judicial proceedings "unreasonable" within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

5.2 The Committee considered the author's claims under articles 6, 7 and 14 of the Covenant to have been sufficiently substantiated, for purposes of admissibility, and noted that the facts as submitted also appeared to raise issues under articles 9 and 10.

5.3 On 11 October 1994, therefore, the Committee declared the communication admissible insofar as it appeared to raise issues under article 6, paragraph 1, and articles 7, 9, 10 and 14, paragraph 3 (c), of the Covenant.

The State party's information and observations on the merits and counsel's comments thereon

6.1 In its initial submission under article 4, paragraph 2, of the Optional Protocol, dated 30 May 1995, the State party observes that the proceedings in the case remain pending and requests the Committee to take that situation into account in the adoption of any final decision.

6.2 As far as disciplinary proceedings are concerned, the State party indicates that the case against Velandia Hurtado and Ortega Araque is pending under file No. 008-147452 before the National Delegate for Human Rights. The formal procedure was initiated on 3 March 1994. According to the National Delegate, the case was still proceeding as of 17 April 1995.

6.3 As to criminal proceedings, the State party notes that the prosecutor's office of Caqueza (Cundinamarca) (Unidad de Fiscalías de Caqueza) was (initially) handling the case, under the authority of prosecutor Myriam Aida Saha Hurtado. A formal criminal investigation was only launched by decision of 17 March 1995 (Resolución de Apertura de la Instrucción) of a prosecutor in the Cundinamarca District (Fiscal Seccional 2ª de la Unidad Delegada ante los Jueces del Circuito de Caqueza (Cundinamarca)), who considered that the file contained sufficient evidence to indict Velandia Hurtado and others. However, by decision of 5 April 1995, the file, consisting of twelve folders, was transmitted to the Joint Secretariat of the Regional Prosecutors' Directorate in Bogotá (Secretaría Común de la Dirección Regional de Fiscalías de Santafé de Bogotá), considered to be competent in the case.

6.4 Finally, concerning the administrative proceedings initiated by Nydia Bautista's family against the Ministry of Defence, the State party observes that they are in their final stages before the Administrative Tribunal

of Cundinamarca. After two procedural decisions of 27 February and 4 April 1995 ("... se decretaron pruebas de oficio mediante autos del 27 de febrero y 4 de abril de 1995"), the matter has been reserved for judgement.

6.5 In a further submission dated 14 July 1995, the State party forwards copies of the decision of the National Delegate for Human Rights of 5 July 1995, as well as of the judgement of the Administrative Tribunal of Cundinamarca of 22 June 1995.

6.6 The salient points of the decision of the National Delegate for Human Rights (entitled "Resolución 13 de Julio 5 de 1995 mediante la cual se falla el proceso disciplinario 008-147452"), after recalling the facts and the procedure from 3 March 1994 to the spring of 1995, are the following:

- The Delegate rejects Col. (now Brigadier General) Velandia Hurtado's defence that disciplinary action against him falls under the applicable statute of limitations and that the National Delegate for Human Rights was not competent to hear the case. Similar defence arguments put forth by Sergeant Ortega Araque are equally rejected.

- The Delegate characterizes the phenomenon of forced disappearance in general as a violation of the most basic human rights enshrined in international human rights instruments, such as the right to life and the right to liberty and personal physical integrity, considered to be part of jus cogens and/or of customary international law.

- On the basis of the evidence placed before it, the Delegate considers the abduction and subsequent detention of Nydia Bautista as illegal ("la captura de Nydia E. Bautista fue abiertamente ilegal por cuanto no existía orden de captura en su contra y no fue sorprendida en flagrancia cometiendo delito alguno").

- The disappearance must be attributed to State agents, who failed to inform anyone about the victim's apprehension and her whereabouts, in spite of investigations of the military authorities to locate Mrs. Bautista: "The victim's abduction was not brought to the attention of any authority and is not certified in any register" ("... sobre su retención no se informó a ninguna autoridad y tampoco apareció registrada in ningún libro").

- The Delegate qualifies as credible and beyond reasonable doubt the evidence of Nydia Bautista's violent death, after being subjected to ill-treatment, in particular on the basis of the report prepared by the Office of Special Investigations (Oficina de Investigaciones Especiales) after the exhumation of her remains.

- Despite the challenges to the testimony of Bernardo Garzón Garzón put forward by Velandia Hurtado and Ortega Araque, the Delegate attaches full credibility to the deposition of Mr. Garzón Garzón made on 22 February 1991.

- The Delegate rejects as unfounded the defendants' charge that the disciplinary procedure did not meet all the requirements of due process. In particular, she dismisses Mr. Velandia Hurtado's defence that since he did not give the order for the victim's disappearance

and death, he should not be held responsible. Rather, the Delegate concludes that as the commanding officer for intelligence and counter-intelligence activities of his military unit, Mr. Velandia Hurtado "had both the duty, the power and the opportunity to prevent this crime against humanity" (... "tenía el deber, y poder y la oportunidad de evitar que se produjera este crimen contra la humanidad").

- The Delegate concludes that by virtue of his failure to prevent Nydia Bautista's disappearance and assassination, Mr. Velandia Hurtado violated her rights under articles 2, 5, 11, 12, 16, 28, 29 and 30 of the Colombian Constitution, under articles 3, 4, 6, 7 and 17 of the American Convention on Human Rights and articles 6, 9, 14 and 16 of the International Covenant on Civil and Political Rights. By his action, Mr. Velandia Hurtado further violated his duties as a military official and contravened article 65, section B, subparagraph (a) and article 65, section F, subparagraph (a) of the Rules of Military Discipline of the Armed Forces (Reglamento Disciplinario para las Fuerzas Armadas).

- Similar conclusions are reached for the responsibility of Sergeant Ortega Araque. In particular, the Delegate rejects Mr. Ortega's defence that he was only carrying out the orders of a superior, since obedience "cannot be blind" ("la obediencia no puede ser ciega").

6.7 As the Delegate found no mitigating circumstances for the acts of Velandia Hurtado and Ortega Araque, she requested their summary dismissal from the armed forces. The decision was transmitted to the Minister for the Armed Forces.

6.8 The principal points made in the Judgement of the Administrative Tribunal of Cundinamarca of 22 June 1995 may be summarized as follows:

- The Tribunal considers the complaint filed by Nydia Bautista's family admissible in its form. It rejects the argument of the Ministry of Defence that the charges fall under the applicable statute of limitations (five years), since the case concerns not only the victim's disappearance but also her torture and death; on the latter, there could only have been certainty after exhumation of the body in July 1990.

- The Tribunal considers it established that Nydia Bautista was abducted on 30 August 1987, and that she was tortured and assassinated thereafter. It concludes that the evidence before it firmly establishes the responsibility of the armed forces in the events leading to the victim's death. Reference is made in this context to the procedure pending before the National Delegate for Human Rights.

- Like the National Delegate for Human Rights, the Tribunal attaches full credibility to the deposition made by Mr. Garzón Garzón on 22 February 1991, which corroborates, in all essential points, the claims made by Nydia Bautista's family since August 1987; this relates, for example, to the make and the license plate of the jeep in which Nydia Bautista was abducted. The Tribunal notes that Mr. Garzón Garzón requested police protection for himself and his family after his deposition.

- The Tribunal concludes that the State party's authorities involved in the victim's illegal disappearance and death are fully responsible. As a result, it awards the equivalent of 1,000 grams in gold to both parents, the husband and the son of Nydia Bautista, and the equivalent of 500 grams in gold to her sister. The Ministry of Defence is further directed to pay a total of 1,575,888.20 pesos plus interest and inflation-adjustment to Nydia Bautista's son for the moral prejudice suffered.

6.9 Under cover of a note dated 2 October 1995, the State party forwards a copy of Presidential Decree No. 1504, dated 11 September 1995, which stipulates that Mr. Velandia Hurtado is dismissed from the armed forces with immediate effect. In an explanatory press communiqué, it is noted that it remains open to Mr. Velandia Hurtado to challenge the decree or to take such other action as he considers appropriate before the competent administrative tribunal.

7.1 In his initial comments, counsel notes that Mr. Velandia Hurtado sought to challenge the competence of the National Delegate for Human Rights handling the case, Dr. Valencia Villa, in March 1995, and that he sought to file criminal charges against her, presumably for defamation. On the basis of recent reports about further instances of intimidation of Nydia Bautista's sister by agents of the military's intelligence service, counsel expresses concern about the physical integrity of the National Delegate for Human Rights.

7.2 In further comments dated 27 July 1995, counsel notes that efforts to notify Velandia Hurtado or Ortega Araque of resolution No. 13 of 5 July 1995 have so far failed, as neither they nor their lawyers replied to the convocation issued by the Ministry of Defence. Faced with that situation, the Office of the National Delegate for Human Rights sent the notification by registered mail, requesting the Ministry of Defence to comply with the law and respect the terms of resolution No. 13. Mr. Velandia Hurtado, in turn, filed a request for protection of his constitutional rights (acción de tutela) with the Administrative Tribunal of Cundinamarca, on the ground that the guarantees of due process had not been respected in his case. Counsel adds that the family of Nydia Bautista, and in particular her sister, continue to be subjected to acts of intimidation and harassment. In this context, he notes that the family's first lawyer, Dr. A. de Jesus Pedraza Becerra, disappeared in Bogotá on 4 July 1990, a disappearance condemned by the Inter-American Commission on Human Rights which was seized of the case.[b]

7.3 Counsel acknowledges receipt of the judgement of the Administrative Tribunal of Cundinamarca of 22 June 1995 and notes that that judgement, together with resolution No. 13 handed down by the National Delegate for Human Rights, constitutes irrefutable proof of the responsibility of State agents for the disappearance and subsequent death of Nydia Bautista.

7.4 As to the state of criminal investigations, counsel notes that the case still remains with the Regional Prosecutors' Directorate of Bogotá (Dirección Regional de Fiscalías de Santafé de Bogotá), where the case has been assigned to one of the recently created human rights units of the Chief Prosecutor's office. According to counsel, the human rights units are still inoperative. Thus, when Nydia Bautista's family sought to obtain information about the state of criminal proceedings, it learned that the building supposed to house the human rights units was still unoccupied. Counsel further observes that in accordance with article 324 of the Colombian Code of Criminal Procedure, preliminary

investigations must be initiated once the identity of those presumed to be responsible for a criminal offence is known, and formal investigations following an indictment must start within two months. In the instant case, since the identity of those responsible for Nydia Bautista's disappearance and death were known at the very latest after the deposition of Mr. Garzón Garzón on 22 February 1991, counsel concludes that the terms of article 324 have been disregarded.

7.5 In the latter context, counsel once again points to what he perceives as unacceptable negligence and delays in the criminal investigations. At least once, on 30 June 1992, the office of Examining Magistrate 94 (Juzgado 94 de Instrucción Criminal) ordered the closure of the investigation in spite of the deposition of Mr. Garzón Garzón. The magistrate justified his decision under the terms of Law 23 of 1991 (Ley de Decongestión de Despachos Judiciales), article 118 of which provides for the closure of those preliminary enquiries in which more than two years have elapsed without the identification of a suspect. That decision, counsel notes, had no basis in reality, given the evidence of Mr. Garzón Garzón. Counsel concludes that almost eight years have passed since the date - 5 November 1987 - on which Magistrate's Court 53 (Juzgado 53 de Instrucción Criminal) first opened preliminary criminal investigations (Indagación Preliminar No. 280). Over a period of almost eight years, the order to dismiss Velandia Hurtado and Ortega Araque constitutes the first true sanction, a sanction which has still not been implemented.

7.6 By letter of 29 August 1995, counsel complains that the State party's government continues to stall in implementing the order of dismissal pronounced against Mr. Velandia Hurtado. The latter indeed appealed against the decision of the National Delegate for Human Rights to notify him of the decision of 5 July 1995 by registered mail (acción de tutela, see para. 7.2 above). On 2 August 1995, the Administrative Tribunal of Cundinamarca decided in his favour, on the ground that the mode of notification chosen by the Office of the National Delegate for Human Rights had been illegal. It ordered the Office to notify to Mr. Velandia Hurtado personally of resolution No. 13.

7.7 With that decision of the Administrative Tribunal, counsel contends, resolution No. 13 of 5 July 1995 cannot be implemented. Since the remains of Nydia Bautista were recovered on 26 July 1990 and under the terms of the applicable disciplinary procedure, a statute of limitations of five years begins to run from the day of the "final constituent act of the offence" ("último acto constitutivo de la falta" - Law No. 24 of 1975, article 12), it is now likely that the case will be filed because of prescription of the offences attributed to Velandia Hurtado and Ortega Araque.

7.8 Counsel further points out that far from ordering the dismissal of Mr. Velandia Hurtado from the armed forces, the authorities promoted him to Brigadier General and, during the first week of August 1995, awarded him the Order for Military Merit "José María Córdova", an award made pursuant to a decree signed by the President of the Republic. According to counsel, the award constitutes an act of defiance vis-à-vis the Colombian judicial organs and a reward for Mr. Velandia Hurtado's past activities. In short, it can only be interpreted in the sense that the Colombian Executive is prepared to tolerate and let go unpunished even serious human rights violations. That attitude is said to have been confirmed by the so-called Defensor del Pueblo in his second report to the Colombian Congress, in which he criticizes the fact that human rights violators in Colombia can expect to benefit from total impunity.

7.9 Finally, counsel refers to an incident on 31 August 1995, which is said to confirm that nothing is, or will be, done to bring those responsible for Nydia Bautista's death to justice. On that day, Mrs. Bautista's family and members of the Association of Relatives of Disappeared Prisoners met in a popular restaurant in Bogotá to demonstrate on the occasion of the eighth anniversary of Nydia's disappearance. Soon after their arrival, an individual in civilian clothes entered the restaurant and occupied a table next to theirs. All those present identified Brigadier General Velandia Hurtado, who continued to monitor the group throughout the meeting. The presence of Mr. Velandia Hurtado, who otherwise commands the Third Army Brigade in Cali, on those particular premises on that particular day is considered to be yet another instance of intimidation of Nydia Bautista's family.

Examination of the merits

8.1 The Human Rights Committee has examined the present case on the basis of the material placed before it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 In its submission of 14 July 1995, the State party indicates that resolution 13 of 5 July 1995 pronounced disciplinary sanctions against Velandia Hurtado and Ortega Araque, and that the judgement of the Administrative Tribunal of Cundinamarca of 22 June 1995 granted the claim for compensation filed by the family of Nydia Bautista. The State party equally reiterates its desire to guarantee fully the exercise of human rights and fundamental freedoms. Those observations would appear to indicate that, in the State party's opinion, the above-mentioned decisions constitute an effective remedy for the family of Nydia Bautista. The Committee does not share that view, because purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life.

8.3 In respect of the alleged violation of article 6, paragraph 1, of the Covenant, the Committee recalls its general comment No. 6 (16), on article 6, which states, inter alia, that States parties should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate, thoroughly, by an appropriate and impartial body, cases of missing and disappeared persons in circumstances that may involve a violation of the right to life. In the instant case, the Committee notes that both resolution No. 13 of the National Delegate for Human Rights of 5 July 1995 and the judgement of the Administrative Tribunal of Cundinamarca of 22 June 1995 clearly establish the responsibility of State agents for the disappearance and subsequent death of Nydia Bautista. The Committee concludes, accordingly, that in those circumstances the State party is directly responsible for the disappearance and subsequent assassination of Nydia E. Bautista de Arellana.

8.4 As to the claim under article 7 of the Covenant, the Committee has noted the conclusions contained in resolution No. 13 of 5 July 1995 and in the judgement of the Administrative Tribunal of Cundinamarca of 22 June 1995, to the effect that Nydia Bautista was subjected to torture prior to her assassination. Given the findings of those decisions and the circumstances of Mrs. Bautista's abduction, the Committee concludes that Nydia Bautista was tortured after her disappearance, in violation of article 7.

8.5 The author has alleged a violation of article 9 of the Covenant. Both decisions referred to above conclude that Nydia Bautista's abduction and subsequent detention were "illegal" (see paras. 6.6 and 6.8 above), as no warrant for her arrest had been issued and no formal charges against her were known to exist. There has, accordingly, been a violation of article 9, paragraph 1.

8.6 The author has, finally, claimed a violation of article 14, paragraph 3 (c), of the Covenant, because of the unreasonable delays in the criminal proceedings instituted against those responsible for the death of Nydia Bautista. As the Committee has repeatedly held, the Covenant does not provide a right for individuals to require that the State criminally prosecute another person. The Committee nevertheless considers that the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. That duty applies a fortiori in cases in which the perpetrators of such violations have been identified.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation by the State party of articles 6, paragraph 1; 7; and 9, paragraph 1, of the Covenant.

10. Under article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the family of Nydia Bautista with an appropriate remedy, which should include damages and an appropriate protection of members of Nydia Bautista's family from harassment. In this regard, the Committee expresses its appreciation for the content of resolution 13, adopted by the National Delegate for Human Rights on 5 July 1995, and of the judgement of the Administrative Tribunal of Cundinamarca of 22 June 1995, which provide an indication of the measure of damages that would be appropriate in the instant case. Moreover, although the Committee notes with equal appreciation the promulgation of Presidential Decree No. 1504 of 11 September 1995, the Committee urges the State party to expedite the criminal proceedings leading to the prompt prosecution and conviction of the persons responsible for the abduction, torture and death of Nydia Bautista. The State party is further under an obligation to ensure that similar events do not occur in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] The file reveals that Mr. Garzón Garzón requested special police protection for himself and his family after giving his testimony.

[b] Case No. 10581.

[c] See Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40), annex XI.B, communication No. 213 (1968) (H.C.M.A. v. the Netherlands, decision of 30 March 1989, para. 11.6; ibid., Forty-fifth Session, Supplement No. 40 (A/4/40), vol. II, annex X.J, communication No. 275/1988 (S.E. v. Argentina), decision of 26 March 1990, para. 5.5; and ibid., annex X.R, communications Nos. 343, 344 and 345/1988 (R.A.V.N. et al v. Argentina), decision of 26 March 1990, para. 5.5.

T. Communication No. 566/1993, Ivan Somers v. Hungary (views adopted on 23 July 1996, fifty-seventh session)*

Submitted by: Ivan Somers

Victims: The author and his mother

State party: Hungary

Date of communication: 20 August 1993 (initial submission)

Date of decision on admissibility: 15 March 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 July 1996,

Having concluded its consideration of communication No. 566/1993, submitted to the Human Rights Committee by Mr. Ivan Somers, on his and his mother's behalf, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Ivan Somers, an Australian citizen of Hungarian origin currently residing in Edgecliff, New South Wales, Australia. He submits the complaint on his and his mother's behalf, and alleges violations by Hungary of articles 14, 18, 19, 21, 22, 24, and 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Hungary on 7 December 1988.

The facts as submitted by the author

2.1 In March 1951, the author's parents and his maternal grandmother were arrested by the Hungarian Communist State Security Police (AVH). They were taken to the AVH headquarters in Budapest, interrogated over a period of four weeks and forced to sign false confessions which, according to the author, had been prepared well in advance. The author's parents were then interned, without trial, at the prison of Kistarcsa, on the pretext that they had failed to inform on the author's grandmother, who had allegedly given a parcel of clothing to a Russian officer to take to her son then living in Vienna.

2.2 According to the author, the true reason for the arrest only became known in 1992, when he was able to obtain a copy of a report drawn up in 1952 by the local branch of the AVH in the town where his parents had lived (reference No. 23-5354/52). That report had been addressed to the AVH headquarters in Budapest.

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* Pursuant to rule 85 of the rules of procedure, Committee member Tamás Bán did not participate in the examination of the communication.

2.3 The report charged the author's parents with being opponents of the Communist party. It identified the author's father as an influential member of the Social Democratic Party, which was then being "liquidated". The report further singled out his parents as members of the local Jewish community with alleged "Zionist connections". The author submits that in the early 1950s, any such accusation was sufficient to cause someone's imprisonment without trial.

2.4 The author refers in particular to paragraph 3 of the report, which confirms that, following his parents' arrest, all the family's property and assets were confiscated by the local governmental authorities. Those expropriations pre-date the nationalization of private property in Hungary. The difference is said to be demonstrated by the fact that in spite of the nationalization of land and property under the Communist regime, many Hungarians were allowed to keep their home. In the case of the author's parents, however, their home in a two-storey apartment building in the town of Szekesfehervar, which belonged to the father of Mr. Somers, was confiscated and immediately occupied by the secretary of the local branch of the Communist party.

2.5 The author's mother and grandmother were released in August 1953, following an amnesty decreed after the death of Stalin. His father died in prison under circumstances that, to date, remain largely unexplained.

2.6 Since 1953, the author's mother has made numerous attempts to recover her former home. Those attempts continued after she emigrated to Australia. Local government authorities in Hungary have rejected her claim, despite a gradual move, in Hungary, to restitute property seized under the Communist regime to the former owners.

The complaint

3.1 In 1991 the Hungarian Parliament was called upon to consider the status of properties expropriated during the Communist period. In adopting new legislation, the State party has failed, in the author's opinion, to distinguish between cases in which the expropriation was the consequence of breaches of the Covenant and the majority of cases in which the expropriation was the result of the nationalization of private property.

3.2 It is submitted that by rejecting restitution of property in favour of what amounts to no more than nominal monetary compensation - worth approximately 2 per cent of the current market value of the property seized by the State - the new legislation gives continuing effect to those expropriations, regardless of whether they were linked, in the past, to violations of the Covenant.

3.3 The author submits that his family's assets were seized by the State party in violation of articles 14, 18, 19, 21, 22, 24, and 26 of the Covenant (i.e. before the widespread nationalization programme in Hungary). He contends that the only proper course for Hungary would be to restitute those assets which were obtained by the State through extralegal or illegal means. The current Government's failure to restitute property obtained by such means is said to amount to its endorsing breaches of the Covenant committed during the Communist period.

The State party's observations and the author's comments

4.1 In its submission under rule 91 of the rules of procedure, dated 31 March 1994, the State party contends that as the events complained of occurred prior to the date of entry into force of the Optional Protocol for Hungary, the communication should be deemed inadmissible ratione temporis. In this context, the State party refers to the 1969 Vienna Convention on the Law of Treaties and, in particular, to its article 28 laying down the principle of non-retroactivity of treaties.

4.2 The State party emphasizes that it has always expressed "its deepest sympathy with victims of violations of human rights committed under the previous regime ... It has been and remains committed to provide those victims with moral support and, in accordance with the relevant legislative acts, financial compensation to the victims."

5.1 In his comments, Mr. Somers reiterates that his parents were arrested and persecuted on the basis of their social background and their political beliefs. He provides a certificate dated 6 July 1993 from the Hungarian Indemnification and Compensation Authority, in which the State party acknowledges that his mother was wrongfully imprisoned; a letter dated 7 July 1993 from the same authority acknowledges that the death of his father resulted from the unlawful action of government agents.

5.2 To the author, the political nature of the expropriation of his family's home and assets is demonstrated by the fact that it occurred prior to the adoption of Law Decree No. 4 of 1952, on the nationalization of private property. He adds that by Act 1027 of 1963, the then Government of Hungary allowed a number of former owners of real estate to request the annulment of an expropriation order, with the possibility of restitution. However, to the application of the author's mother, the authorities replied that she did not come within the scope of application of Act 1027 and that, as a former internee, her former house in Szekesfehervar could not be restituted to her.

5.3 In 1991 the Constitutional Court of Hungary (Alkotmánybiroság) quashed Law Decree 4 of 1952 as unconstitutional. The author notes, however, that the decision apparently did not affect expropriations carried out pursuant to the Decree.

5.4 Regarding the State party's argument ratione temporis, the author reiterates that his case refers to action taken by the State party since the ratification of the Covenant and the Optional Protocol. He notes that in contrast to legislation adopted in the former Czechoslovakia and in Germany, where the rightful owners of property formerly seized by the State may claim restitution, Hungarian legislation passed in 1991 (Law No. XXV of 1991) and in 1992 (Law No. XXVI) merely recognizes the right of owners to nominal compensation and excludes restitution except for the property of religious orders. Accordingly, the legislation is said to sanction the State party's continued ownership of property confiscated during the Communist period.

5.5 Mr. Somers contends that as victims of political persecution under the former regime, he and his mother face particular disadvantages under current Hungarian law and practice relating to the privatization of (State) property. He explains that the tenants currently occupying residential property in Hungary

enjoy an option to buy their home from the local government authority on a priority basis.

5.6 The author submits that by restricting the rights of former owners, including those dispossessed on account of political persecution, to compensation, the 1991 legislation has enabled the Hungarian Government to reap substantial profits from the sale, at current market prices, of property seized under the Communist regime. Moreover, owners are barred from claiming even the proceeds of the sale of their property by the State. He encloses a letter dated 21 June 1994 from a government agency acting on behalf of the City Council of Szekesfehervar, which states that notwithstanding the proceedings before the Human Rights Committee, the agency will proceed with the sale of the author's family home.

5.7 The author further points out that the 1991 legislation does not distinguish between nationalization of private property by legislation from confiscation of the property of former political prisoners, such as the author's parents. He notes that the 1991 legislation obliges the State to pay compensation in the form of vouchers, whose value is calculated by reference to an (arbitrarily chosen) amount per square metre of the building. Under the legislation, he received vouchers with a face value of 333,000 forint in full settlement for his parents' former home, an amount equivalent to approximately $3,330. The author adds that those vouchers traded on the Hungarian stock exchange for only 42 per cent of their face value (the equivalent of $1,400) and have since become worthless, as they have ceased to be listed owing to lack of demand.

5.8 The discriminatory nature of the regulation is said to be further demonstrated by the fact that the current occupants of residential properties who enjoy a "buy first option" may insist that the total face value of the vouchers circulated in accordance with the 1991 and 1992 legislation on partial compensation is set off against the purchase price of their home. The author therefore concludes that under the current legislation, he is in a substantially worse position than someone who, though dispossessed of legal ownership by the 1952 Law Decree, was able to remain in his or her home as a tenant.

5.9 The author rejects as "totally inconsistent with the State party's current status as a party to the Covenant and the Protocol" the possibility that it may now derive potential financial benefits from the sale of his family's property. He requests the Committee to seek restitution of his property or, alternatively, the full proceeds of its sale.

The Committee's admissibility decision

6.1 The Committee considered the admissibility of the communication during its fifty-third session. It noted the author's claim relating to the confiscation of his family's property in 1951 and observed that irrespective of the fact that those events occurred prior to the entry into force of the Optional Protocol for Hungary, the right to property was not protected under the Covenant. The allegation concerning a violation of the author's and his mother's right to property per se was thus inadmissible ratione materiae, under article 3 of the Optional Protocol.

6.2 Regarding the author's claims under articles 14, 18, 19, 21, 22 and 24 of the Covenant, the Committee noted that the author had failed to substantiate,

for purposes of admissibility, how State party action prior to the entry into force of the Optional Protocol for Hungary had continued to produce effects which in themselves would constitute a violation of any of those rights after the entry into force. Those claims were deemed inadmissible ratione temporis.

6.3 As to the author's further complaint that legislation on compensation for expropriation during the Communist period adopted in 1991 and 1992 (i.e. after the entry into force of the Optional Protocol for Hungary) was discriminatory in that it placed him and his mother, as victims of political persecution during the Communist period, in a significantly more unfavourable position than those expropriated under Law Decree 4 of 1952, the Committee noted that the State party had not addressed that point and merely argued that all of the claims are inadmissible ratione temporis. It recalled that the State party's obligations under the Covenant applied as of the date of entry into force for the State party. There was, however, another issue as to when the Committee was competent to consider complaints about violations of the Covenant under the Optional Protocol: it was the Committee's jurisprudence under the Optional Protocol that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Protocol for the State party unless the violations complained of continue after the entry into force of the Protocol. A continuing violation must be interpreted as an affirmation, by act or clear implication, of the previous violations of the State party.

6.4 It was correct that Mr. Somers and his mother did not fall under the terms of the State party's 1991-1992 legislation concerning compensation for expropriation during the Communist period. The Committee noted that that was the crux of their claim under article 26: they considered that the omission of a clearly cognizable group of individuals - i.e. those who were discriminated against on the basis of political opinion and/or social origin prior to Law Decree 4 of 1952 - from the scope of that legislation constituted discrimination contrary to article 26, and that their situation should have been addressed in relevant legislative provisions. It concluded that that issue was based on acts of the State party which occurred after the entry into force of the Optional Protocol for Hungary and believed that it required examination under article 26 of the Covenant.

6.5 On 15 March 1995, the Committee therefore declared the communication admissible insofar as it appeared to raise issues under article 26 of the Covenant.

The State party's observations on the merits and the author's comments thereon

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 31 January 1996, the State party recalls that for compensation for expropriation under the former Communist regime, three Acts of Parliament have been enacted (Acts XXV of 1991 and XXVI and XXXII of 1992). Of those, only Act XXV is relevant to the author's case. Section 1, subsection 2, of the Act stipulates that compensation is due to those individuals whose property had been seized through application of regulations enacted after 8 June 1949. Compensation is partial, and its sum total must be calculated on the basis of a chart contained in section 4, subsection 2, of the Act. Regarding the modalities of compensation, section 5, subsection 1, provides that compensation vouchers will be issued for the total amount of compensation. Under subsection 2, those vouchers are bearer securities, transferable, and their face value is the sum total of debt owed by the State. Under section 7,

subsection 1, the State must ensure that bearers of such vouchers may use them under the conditions laid down in the Act (a) for purchasing property and other assets sold during privatization of State property, or (b) for obtaining farm land.

7.2 As to privatization legislation, the State party indicates that insofar as the author's case is concerned, Act LXXVIII of 1993, on the privatization of residential property is relevant. Its section 45 confers on tenants of apartments in State or local government ownership the right to purchase the property they occupy. The State party emphasizes that the right to purchase an apartment is conferred upon tenants irrespective of their being past victims of violation of the right to property or other rights. Nor is the right to buy the apartment dependent on the tenant's other status, such as residence or citizenship; it is immaterial whether the tenant was or was not the owner of the property he or she currently rents before the extensive nationalization of property in the 1940s and 1950s. The only criterion for eligibility to buy the property is that the buyer is currently the tenant.

7.3 As to the claim under article 26 of the Covenant, the State party dismisses the author's contention that as victims of political persecution under the former political regime, he and his mother face specific disadvantages since, unlike tenants currently occupying property and enjoying an option to buy it from the Government at attractive prices, they cannot do so. It notes that the reason the author and his mother cannot recover their old property is factual, not legal, as they are not tenants of any residential property in State or local government ownership. In the State party's view, the difference in treatment of two different groups of people - tenants and non-tenants - and the difference in treatment of those two groups by law is based on objective criteria and is reasonable in the sense that tenants have, in the practice of the Hungarian tenancy system, always contributed financially to the maintenance of their apartments or invested money in those apartments so as to increase their comfort. The difference in treatment thus cannot be said to constitute prohibited discrimination.

7.4 In respect of the author's claim that, in the 1991 and 1992 legislation on compensation for past violations of property rights, Hungary failed to distinguish between cases in which expropriation was the result of breaches of the Covenant and the majority of cases in which expropriation resulted from the nationalization of private property, the State party points out that at the time (i.e. in the early 1950s), no clear-cut distinction between confiscation or nationalization on political or other grounds existed in Hungary: at the time, nationalization provided for by law and confiscation pronounced by court or administrative orders served a political end, namely to dispossess the wealthy and others considered as opponents of the regime. Thus, in the State party's opinion, the author's starting point is incorrect. In this context, it notes that the transfer of the author's parents' home into State property was, contrary to Mr. Somers' assertion, precisely based on Law Decree 4 of 1952, entitled "[O]n the transfer of certain buildings into State ownership". The extract from the land register and decision No. 21-1122543-0015598 on the author's compensation show that Mr. Somers' father was dispossessed on the basis of Law Decree 4.

7.5 The State party argues that the wording of section 1 of Law Decree 4 clearly shows that the Decree was motivated by the intention to dispossess owners of real estate on political grounds. As Mr. Somers was compensated for

the deprivation of his father's property pursuant to Law Decree 4, the State party argues that it cannot be said that the author suffered harm since the legislation on compensation failed to take into account that his father had been dispossessed of his property as a result of political persecution. Hence, that claim is said to be unfounded.

7.6 The State party concedes that the value of the vouchers the author was given as compensation was indeed lower than the value of his father's home. But, the State party adds, Hungarian compensation legislation only provides for partial compensation of past grievances, as full compensation cannot be granted owing to the "huge number of claims and the difficult economic situation of the country". Such exceptions as exist to that rule do not in any event apply to the author's case. The calculation of compensation due is based on objective criteria: pursuant to section 4 of Act XXV of 1991, the same criteria are applied to all applicants. Moreover, all decisions on compensation are subject to appeal if the applicant believes that the law was not applied correctly to his case. The State party notes that on the basis of available information, the author did not appeal against the decision on compensation.

7.7 As to the allegation that the Hungarian compensation legislation is discriminatory because those who are authorized to buy the residential property they occupy can set off the total face value of the vouchers against the purchase price whereas the author, as a non-tenant, cannot do so, the State notes that while that possibility is indeed provided for under section 7, subsection 1, of Act XXV of 1991, there can be no question of prohibited discriminatory treatment. In the State party's view, the author simply compares two groups of people without in fact taking into account the substantial difference between the situation of the two groups - i.e., those who are the tenants of the apartment against the purchase price of which vouchers can be set off, and those who are neither occupants nor tenants of any apartment in State or local government ownership. For the State party, "not taking into account this difference leads to an arbitrary comparison of two situations under article 26 of the Covenant". An issue under article 26 would only arise if Hungarian law treated occupants or tenants of State-owned dwellings differently, allowing some to set off vouchers and denying others the possibility to do so. As that is not the author's situation, the State party concludes that he is not discriminated against, as he is not the tenant of any residential property to be sold under the privatization legislation.

7.8 In conclusion, and by reference to the Committee's general comment No. 18 (37), on article 26,[a] the State party argues that the Hungarian legislation on compensation of past grievances and on privatization of residential property, as well as their application to the author's case, is in compliance with the provisions of article 26 of the Covenant.

8.1 In his comments, the author notes that the State party itself admits that confiscation of residential property under the former regime violated the Covenant, as the nationalization legislation and confiscation orders served the purpose of dispossessing the wealthy and opponents of the regime (see para. 7.4 above). That being the case, the State party should have provided an "effective remedy" to the victims of such violations. The author refers to the Committee's views on communication No. 516/1992,[b] in which it was held that the appropriate remedy in respect of unlawful confiscation of property may be compensation if the property in question cannot be returned. He recalls that his communication referred, inter alia, to Hungary's failure (in contrast to laws adopted by

Germany or the Czech Republic and Slovakia) to return property confiscated from individuals during the Communist period. No explanations were offered by the State party about its failure to return residential property to its rightful owners: Mr. Somers observes that the State party still could, if it wanted, return his father's home to him, subject to the protection of the current tenants, as the property exists and former ownership is not disputed.

8.2 As to the amount of compensation awarded by the State party, the author recalls that the sum payable for notional losses in excess of approximately 200,000 forint ($2,000) is progressively reduced by applying the compensation scale in section 4, subsection 2, of Act XXV of 1991. Compensation is reduced to 10 per cent for any part of the loss over 500,000 forint. For the author, that "scale of compensation" displays the same ideological prejudice as Law Decree 4 of 1952, i.e. to dispossess the wealthy and others considered opponents of the regime. The negative effect on someone in Mr. Somers' situation, it is pointed out, is compounded by the fact that there is no compensation in respect of the land component of the property, loss of income from rent, or confiscation of the contents of someone's home. That compensation is paid in vouchers rather than cash and that only "current tenants" of residential property in State ownership may use vouchers to buy property, contrary to the former owners of the property who were displaced from it in violation of their rights, is said to further underline the discriminatory nature of the compensation legislation.

8.3 Mr. Somers challenges the justification of the State party's argument that the face value of the vouchers given to him is lower than the value of his late father's property because of the "difficult economic situation of the country". He notes that Hungary's economic situation is no worse than that of the Czech Republic or Slovakia, which have restituted property to their rightful owners: the State party's obligation to provide for adequate compensation arises from its refusal to restitute property it confiscated. Its current economic situation is irrelevant, considering that the income it has derived from the property since 1952, i.e. net proceeds from rent for more than four decades and the proceeds from the privatization sale of the property, is sufficient to cover adequate compensation. Mr. Somers deplores that the State party has failed to address this part of his claim.

8.4 The author rejects as misleading the State party's contention that he did not appeal against the compensation decision, since the 1991 legislation (Act XXV) does not provide for an avenue of appeal in respect of the criteria used to calculate the amount of the author's compensation.

8.5 Mr. Somers asserts that the State party "conveniently ignores" his claim that as victims of political persecution, during the Communist period, he and his mother are faced with additional - discriminatory - disadvantages under the 1991 and 1993 legislation. Thus, Act XXV of 1991 provides no remedy or compensation for the violation inherent in his and his mother's removal from their apartment. Moreover, section 45 of Act LXXVIII of 1993 gives continuing effect to that removal by restricting participation in the privatization of all State-owned residential property to "current tenants". The discriminatory effect of section 45 is allegedly reinforced by section 7, subsection 1, of Act XXV of 1991, which confers on "current tenants" of residential property an exclusive right to use compensation vouchers introduced under the 1991 legislation to purchase the property from the local authority.

8.6 The author dismisses as absurd the State party's contention that it is both fair and reasonable that current tenants should participate in the privatization of residential property on a priority basis, as they have contributed to the maintenance and improvement of their apartments during their tenancy. To the author, that is tantamount to the State party in fact confirming the violations that continue to affect him and his mother as a result of political persecution during the Communist period, as the sole reason for their not being the tenants or occupants of their apartment is their removal from their apartment in 1951 and the sequence of violations which finally made them leave Hungary. The author moreover recalls that his late father's entitlement to the apartment was not based on tenancy; hence, to stipulate tenancy as a precondition for entitlement to participation in the privatization of the apartment is wholly unreasonable.

8.7 In respect of the latter argument, the author explains that there are two kinds of residential property in Hungary: unencumbered freehold properties and properties "affected", i.e. encumbered by the rights of current tenants. In practice, under Act LXXVIII of 1993, current tenants of State-owned property can buy their apartment/home from the local authority for less than half the current unencumbered freehold value of the property. As the author cannot, under section 45 of Act LXXVIII of 1993, participate in the privatization of residential property, he would have, in order to buy an apartment comparable to the one he and his family occupied in 1951, to pay the unencumbered freehold value, that is, approximately double the amount paid for the property by the current tenants. That is said to be another discriminatory element in the State party's legislation.

8.8 The author summarizes the discriminatory elements and disadvantages he and his mother are facing under the 1991 and 1993 legislation as follows:

(a) Absence of any remedy in respect of the unlawful deprivation of their right to occupy their apartment, i.e. forced displacement from their home;

(b) Absence of any remedy in respect of the confiscation of the contents of their apartment;

(c) Exclusion, under section 45 of Act LXXVIII of 1993, from the right to participate in the privatization of residential property;

(d) Exclusion, under section 7, subsection 1, of Act XXV of 1991, from the right to use the compensation vouchers they received as nominal compensation for the expropriation of the home of the author's father to purchase residential property;

(e) And, because of the exclusions referred to in (c) and (d) above, the authors were forced to sell their compensation vouchers on the Hungarian stock exchange where they traded for less than half their face value.

The author suggests that so as to redress the discrimination inherent in his exclusion, under the 1993 legislation, from any right to participate in the privatization of their former home, the State party should award them (at least) the full proceeds of the sale of their former apartment.

Examination on the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The present communication was declared admissible only insofar as it may raise issues under article 26 of the Covenant. As the Committee explained in its admissibility decision, the right to property as such is not protected under the Covenant. However, confiscation of private property or failure by a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds, in violation of article 26 of the Covenant.

9.3 The principal issue before the Committee is whether the application of Act XXV of 1991 and of Act LXXVIII of 1993 to the author and his mother resulted in a violation of their right to equality before the law and to equal protection of the law. The author contends that those laws, in their effect, confirm the earlier discriminatory confiscation of his father's property. The Committee notes that the confiscation itself is not at issue here but rather the alleged discriminatory effect of the compensation law on the author and his mother.

9.4 The Committee must first determine whether the application of the State party's compensation legislation, regulated by Act XXV of 1991, to the authors' case was discriminatory. As noted in the previous paragraph, the only issue is whether the award of less than full compensation for the loss of the author's property, under Act XXV of 1991, is contrary to article 26 of the Covenant. The Committee observes that Act XXV contains objective compensation criteria, which are applied equally and without discrimination to individuals in the author's situation.

9.5 As to whether the compensation criteria and calculation tables for compensation in Act XXV are reasonable, the Committee has noted the author's argument that the value of the bearer securities in the form of vouchers he received as compensation differs de facto, depending on whether the bearer is the tenant of State-owned residential property or not, as only the former can use the vouchers under the conditions of section 7, subsection 1, of the Act, i.e., may offset them fully against the purchase price of the property. On the basis of the material available to it, the Committee does not share that reading of section 7 of Act XXV.

9.6 The corollary of the fact that the Covenant does not protect the right to property is that there is no right, as such, to have (expropriated or nationalized) property restituted. If a State party to the Covenant provides compensation for nationalization or expropriation on equal terms, it does not discriminate against those whose property was expropriated or nationalized. The Committee is of the opinion that section 7 of Act XXV of 1991 provides for compensation on equal terms. Under section 7 (1), individuals compensated by vouchers but not tenants of any residential property may set off the full face value of their vouchers against the price of any property, shares or business shares sold during the privatization of former State-owned property. That means that if the author wanted to buy former State-owned residential property, he would be able to offset the full face value of the vouchers he received. Similarly, if he decided to invest in other property, such as business shares of former State-owned companies, he would also be able to offset the full face

value of the vouchers. Only if he wanted to redeem his vouchers on the open market because he is not interested in any property other than his former apartment will he receive less than the nominal value of the vouchers.

9.7 On the basis of the considerations set forth in paragraphs 9.5 and 9.6 above, the Committee considers that the compensation criteria in Act XXV are both objective and reasonable.

9.8 The Committee has further examined whether section 9 of Act XXV of 1991 and the privatization legislation of 1993 (Act LXXVIII) are compatible with the requirements of article 26 of the Covenant. Under section 9 of Act XXV, if the tenant does not exercise the "buy first option" to purchase the residential property he or she occupies, the former owner of the property may purchase it and, in so doing, may offset the full value of the vouchers he or she received against the purchase price. As in the case of Act XXV, the criteria for the privatization of former State-owned property in Act LXXVIII of 1993 are objective. The State party has justified the (exclusionary) requirement that current tenants of former State-owned residential property have a "buy first option" even vis-à-vis the former owner of the property with the argument that tenants contribute to the maintenance of the property through improvements of their own. The Committee does not consider that the fact of giving the current tenants of former State-owned property priority in the privatization sale of such property is in itself unreasonable; the interests of the "current tenants", who may have been occupying the property for years, are deserving of protection. If the former owners are, moreover, compensated on equal and non-discriminatory terms (para. 9.6), the interplay between Act XXV of 1991 and Act LXXVIII of 1993 can be deemed compatible with article 26 of the Covenant; with respect to the application of the privatization legislation to the author's case, the Committee does not dispose of sufficient elements to conclude that its criteria were applied in a discriminatory manner.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee do not reveal a breach of article 26 or of any other provision of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] The general comment states that not every differentiation in treatment constitutes discrimination if the differentiation criteria are reasonable and objective and if the aim is to achieve a legitimate purpose under the Covenant. See Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40), vol. I, annex VI.A, para. 13.

[b] Ibid., Fiftieth Session, Supplement No. 40 (A/50/40), vol. II, annex X.K, communication No. 516/1992 (Simunek et al. v. the Czech Republic), views adopted on 19 July 1995.

U. Communication No. 571/1994, Eustace Henry and Everald Douglas v. Jamaica (views adopted on 25 July 1996, fifty-seventh session)*

Submitted by: Eustace Henry and Everald Douglas [represented by counsel]

Alleged victims: The authors

State party: Jamaica

Date of communication: 18 May 1993 (initial submission)

Date of decision on admissibility: 16 March 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 1996,

Having concluded its consideration of communication No. 571/1994, submitted to the Human Rights Committee by Messrs Eustace Henry and Everald Douglas under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, their counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The authors of the communication are Eustace Henry and Everald Douglas, Jamaican citizens who, at the time of submission of their communication, were awaiting execution at St. Catherine District Prison, Spanish Town, Jamaica. The authors claim to be victims of violations by Jamaica of articles 6, 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights. They are represented by counsel. Mr. Henry died at St. Catherine District Prison on 12 December 1993.

The facts as submitted by the authors

2.1 In January 1981, the authors were arrested and charged with the murder of Maria Douglas on 31 July 1980. They remained in custody for two and a half years awaiting trial. On 7 June 1983, the trial against the accused started in the Home Circuit Court, Kingston. On 13 June 1983, the authors were found guilty as charged and sentenced to death. The Court of Appeal of Jamaica dismissed their appeal against conviction on 31 October 1986. Their petition for special leave to appeal to the Judicial Committee of the Privy Council was refused on 26 March 1992. On 18 December 1992, the authors' offence was classified as a capital murder under the Offences against the Person (Amendment) Act, 1992. The authors appealed that decision and in April 1995 Mr. Douglas' offence was reclassified as non-capital and he was sentenced to 15 years of imprisonment.

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* Pursuant to rule 85 of the rules of procedure, Committee member Laurel Francis did not take part in the adoption of the views.

2.2 The case for the prosecution was based on the evidence of one eyewitness, the deceased's sister, Elsie Douglas. She testified that she was lying on her bed in the early morning of 31 July 1980, when she saw six men burst in through a door leading to an adjacent room where her mother slept. She recognized the authors among the men. She heard shots from the room and then saw Mr. Douglas going outside, while Mr. Henry entered her room. While she pretended to sleep, she saw Mr. Henry holding a gun over her sister and heard the sound of shots. He then disappeared for about twenty minutes. When he returned, he shot the witness through the face.

2.3 The witness stated that she had known Mr. Henry for 18 years and that she had been able to see him that night for about 25 minutes. She had known Mr. Douglas for five years and had been able to see him for about 10 minutes that night. The illumination came from an electric light bulb in an adjacent room and from a street light which was positioned some 60 or 70 feet from the house but partially obscured by fruit trees in the yard between the light and the house. The trial transcript reveals that the witness was deeply shocked by the incident and did not recall giving an account of it to a police officer shortly after it occurred.

2.4 The case for the defence was based on alibi. A defence witness, Esmine Witter, testified during the trial that Mr. Henry had been with her and her family during the whole of the night of 31 July 1980. Mr. Douglas' common-law wife, Velmina Beckford, testified that her husband had been seriously injured and suffered gunshot wounds from an incident in June 1980 and that he had not left the house during the night of 31 July 1980. The surgeon who had treated Mr. Douglas for the gunshot wounds testified that he had performed a major operation on him on 20 June 1980, and that he assessed that it would have taken the author four to six weeks to start walking again. A hospital attendant testified that Mr. Douglas was discharged from hospital on 1 July 1980, but that he continued to visit for treatment until October 1980 and that at that time he still had difficulty walking.

The complaint

3.1 The authors submit that they were being threatened by the police upon their arrest; the police allegedly told them that they would be sent to prison because of their association with the People's National Party, the main political opposition party in Jamaica at that time. Mr. Henry states that during his pretrial detention of two and a half years, he shared a cell with two other persons, and that Mr. Douglas shared a cell with four others; they were locked up for 20 hours a day. According to Mr. Henry, the police, in particular one inspector whom he identifies, subjected him to beatings and electric shocks. Mr. Douglas states that he was unable to obtain medication or treatment for the wounds that he suffered in June 1980.

3.2 The authors claim that the trial against them was unfair. They submit that the judge misdirected the jury on the issue of identification, in that he did not deal properly with the question of the quantity and quality of the illumination at the scene of the crime. They further allege denial of justice in that the judge failed to address an unspecified difficulty put to him by the jury. The authors claim that the judge made comments that were unnecessary and highly prejudicial to them. In this context, they note that the judge wrongly directed the jury that the defence's case was based on suggestion of fabrication, which it was not. The judge further allegedly made prejudicial

comments on the alibi evidence presented for Mr. Henry, challenging the defence witness' memory, and, in his summing-up, wrongly interpreted the surgeon's testimony on Mr. Douglas' ability to walk properly. It is also submitted that the judge failed to consider the possibility that the prosecution witness' evidence was flawed because of post-traumatic amnesia; in this connection, it is stated that the prosecution witness had made a statement to the police shortly after the incident, of which she has no recollection.

3.3 During the preliminary hearing, Mr. Henry was unrepresented, whereas Mr. Douglas was represented by a privately retained lawyer, whom he only saw in court. During the trial, the authors were represented by privately retained lawyers. It is alleged that counsel did not consult with them prior to the trial, that they did not discuss the conduct of the case with them during the trial and that they did not show them the written prosecution statements or take instructions from them. Instructions from the authors to call certain witnesses as well as to produce medical evidence were not complied with by counsel. Furthermore, an application to call a certain witness on the issue of the lighting at the crime scene was refused by the judge, who did not wish to adjourn for the purpose of securing the attendance of that witness. A request to the judge for an inspection of the locus in quo was similarly denied. With regard to the appeal, the authors claim that counsel who represented them before the Court of Appeal failed to consult with them before the appeal hearing, at which the authors were not present.

3.4 The authors state that they have been imprisoned on death row for more than 10 years. The long delay and resulting uncertainty caused them severe mental distress. Although Mr. Henry has been diagnosed as having cancer, he was being kept alone in an extremely cold cell without adequate food. Mr. Douglas still suffers from medical problems caused by the gunshot wounds sustained in 1980. It is alleged that the authors' access to a doctor and medical treatment is being obstructed by the prison authorities.

3.5 The authors claim that their prolonged pretrial detention violated articles 9, paragraph 3, and 14, paragraph 3 (c), of the Covenant. They further claim that the ill-treatment they were subjected to in pretrial detention, as well as their present conditions of detention, amount to violations of articles 7 and 10 of the Covenant. Finally, the cumulative effect of the delay in carrying out the execution, exacerbated by the classification under the 1992 Act, is said to constitute a breach of article 7.

3.6 The authors allege that the irregularities which occurred during the trial amount to a violation of article 14, paragraph 1, of the Covenant, and that the failure of the judge to grant an adjournment for the purpose of obtaining the attendance of a defence witness and to permit an inspection of the locus in quo constitutes a violation of article 14, paragraph 3 (e). They contend that counsels' failure to consult with them and to respect their instructions resulted in a violation of article 14, paragraphs 3 (b) and (d). The failure of counsel for the appeal to consult with them, taken together with the fact that the authors were not present during the appeal hearing, is said to constitute a violation of article 14, paragraph 5.

3.7 Finally, the authors invoke a violation of article 6, since they were sentenced to death after a trial during which the provisions of article 14 were not complied with.

3.8 It is submitted that all domestic remedies have been exhausted. The authors observe that they have not filed a constitutional motion, since no legal aid is available in Jamaica for the purpose.

The State party's observations on admissibility and counsel's comments thereon

4.1 By submission of 18 April 1994, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies. It submits that the rights which the authors invoke in their communication are coterminous with rights protected by the Jamaican Constitution and that it is therefore open to the authors to seek redress from the Supreme Court under article 25 of the Constitution. The State party further notes, in respect of the authors' claim that they are victims of a violation of article 6 of the Covenant, that the authors' appeal against the reclassification of their sentences under the Offences against the Person (Amendment) Act is still pending.

4.2 The State party indicates that it has ordered an investigation into the authors' complaints that they were denied medical attention.

4.3 As to the authors' claim under article 14, paragraph 3 (b), of the Covenant, the State party argues that, in the absence of evidence that the State authorities hindered counsel in the preparation of the defence, it cannot be held responsible for the alleged failure of privately retained counsel to consult with their clients.

4.4 As regards the authors' claim that they did not receive a fair trial, the State party notes that the substance of those allegations concern matters of evidence and the instructions given by the judge in relation to the evidence. Invoking the Committee's jurisprudence that matters of evidence are best considered by a State party's appellate tribunals, the State party argues that that allegation concerns issues outside the Committee's jurisdiction.

4.5 The State party rejects the authors' allegation that they are victims of a violation of article 14, paragraph 5, of the Covenant and affirms that their cases were in fact properly reviewed by the Court of Appeal.

5.1 In his comments, counsel refers to his original communication and states that the constitutional remedy is not available to the authors in their circumstances, since legal aid is unavailable. With regard to the claim under article 6 of the Covenant, it is submitted that when the death sentences against the authors were passed, the Offences against the Person (Amendment) Act was not yet enacted. It is argued that that Act cannot retroactively deprive the authors of the protection of article 6.

5.2 As to the authors' complaints of ill-treatment in pretrial detention, counsel points out that they had no access to legal advice and representation.

5.3 In respect of Mr. Henry's claim that he was denied medical attention, counsel states that Mr. Henry's doctor informed him on 15 April 1993, at Kingston Public Hospital that he had submitted a report to the Governor-General of Jamaica, appealing against his continued detention on the basis of his ill health and the necessity for proper treatment. Counsel argues that no further effective domestic remedy was available to Mr. Henry; in this context, he argues that the abuse of condemned prisoners has been a common occurrence for at least

20 years and that the fear of reprisals prevents prisoners from submitting official complaints. Moreover, it is argued that Mr. Henry, because of his severe illness, depended more than the average prisoner on the goodwill of prison staff, thereby reducing the possibility of filing a complaint.

5.4 Counsel states that Mr. Henry died at St. Catherine Prison on 12 December 1993. He claims that throughout the four years of his terminal illness, Mr. Henry was prevented from receiving proper treatment and his condition was exacerbated by the conduct of prison staff and authorities. In this connection, counsel states that Mr. Henry remained in a cell in prison without medical facilities, despite his need for medical care; that he had to find money to pay for his medication, including pain killers and chemotherapy, and that on occasion his supplies were interrupted, causing him additional pain and distress; that his special dietary needs were not met in any way; that the combination of the cold cell, the inadequate treatment and unsuitable food made him feel weak and ill; and that medical appointments were obstructed. Counsel states further that prison authorities were aware of his condition and of his special needs but made no attempt to improve the conditions of his detention in any way. Counsel therefore submits that articles 7 and 10, paragraph 1, of the Covenant were violated in Mr. Henry's case.

The Committee's admissibility decision

6.1 The Committee considered the admissibility of the communication during its fifty-third session. Regarding the State party's contention that the communication was inadmissible for failure to exhaust domestic remedies, the Committee recalled its jurisprudence that for purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must be both effective and available. Noting the State party's argument that a constitutional remedy was still open to the authors, the Committee observed that the Supreme Court of Jamaica had, in some cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in those cases had been dismissed. The Committee, however, recalled that the State party had indicated on several occasions that no legal aid was made available for constitutional motions.[b] It considered that, in the absence of legal aid, a constitutional motion did not constitute an available remedy which needed to be exhausted for purposes of the Optional Protocol.

6.2 The Committee noted that counsel had continued to represent the late Mr. Henry before the Committee. The Committee observed that the issues raised in the initial communication concerning lack of medical treatment and unsatisfactory conditions of detention relate directly to the circumstances of Mr. Henry's death. Noting that counsel had a broad authorization from Mr. Henry to present a communication to the Committee on his behalf, the Committee considered that, in the circumstances, counsel had standing to continue his representation on the pending communication.

6.3 The Committee considered inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, that part of the authors' claim which related to ill-treatment during pretrial detention. The Committee noted that that claim had never been brought to the attention of the Jamaican authorities, either at the trial or on appeal, or in any other way. The Committee referred to its jurisprudence that an author should show reasonable diligence in the pursuit of available domestic remedies. The Committee noted counsel's argument that the authors had no access to legal advice but observed that the authors were

represented at trial by a privately retained lawyer and that no special circumstances existed that prevented them from exhausting domestic remedies in that respect.

6.4 The Committee further considered inadmissible that part of the authors' case relating to the evaluation of evidence, to the instructions given by the judge to the jury and to the conduct of the trial. The Committee reiterated its jurisprudence that it was for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. Similarly, it was not for the Committee to review specific instructions to the jury by the trial judge unless it could be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice.

6.5 As to the authors' complaint that counsel did not consult with them prior to the trial and did not take instructions from them, the Committee concluded that the State party could not be held accountable for alleged errors made by privately retained counsel, unless it would have been manifest to the judge or the judicial authorities that the lawyer's behaviour was incompatible with the interests of justice. That part of the communication was therefore deemed inadmissible.

6.6 With regard to the authors' claim that their right to obtain the attendance and examination of witnesses was violated because the judge failed to grant an adjournment to call a certain witness, the Committee, having examined the court documents, noted that there was no reference to the defence's request to call that witness and that the judge, on three occasions, adjourned the trial in order to give the defence the opportunity to obtain the attendance of another witness. The Committee considered that the authors had failed to substantiate, for purposes of admissibility, that their rights under article 14, paragraph 3 (e), of the Covenant had been violated. That part of the communication was deemed inadmissible under article 2 of the Optional Protocol.

6.7 The Committee considered that the claim that Mr. Henry was unrepresented during the preliminary hearings might raise issues under article 14, paragraph 3 (d), of the Covenant, which should be examined on the merits. It also concluded that the delay between the authors' arrest and the start of their trial, as well as the delay between the conclusion of the trial and the appeal judgement, might raise issues under article 9, paragraph 3, and article 14, paragraphs 3 (c) and 5 juncto 3 (c).

6.8 The Committee further considered that the authors' complaint about the conditions of their detention and the circumstances of Mr. Henry's death might raise issues under articles 7 and 10, paragraph 1, of the Covenant, which should be examined on the merits.

7. On 16 March 1995, therefore, the Human Rights Committee declared the communication admissible in as much as it appeared to raise issues under articles 7; 9, paragraph 3; 10, paragraph 1; 14, paragraphs 3 (c), (d), and 5 juncto 3 (c), of the Covenant.

The State party's submission under article 4 (2) of the Optional Protocol and counsel's comments

8.1 In a submission dated 18 October 1995, the State party states that with regard to the claim that article 14, paragraph 3 (d), of the Covenant has been violated because Mr. Henry was not represented during the preliminary hearing, the author was entitled to receive legal aid and if he chose not to exercise his right, failure to do so cannot be attributed to the State party.

8.2 The authors alleged a violation of article 9, paragraph 3, and article 14, paragraphs 3 (c) and 5 juncto 3 (c), of the Covenant because of an unreasonably long delay between their arrest and the beginning of their trial, as well as the delay between the conclusion of the trial and the appeal judgement. The State party considers that the two and half years of delay between arrest and trial, during which a preliminary hearing was held, does not constitute "undue delay". It further notes that a period of three years and four and a half months between trial and appeal, although undesirably long, cannot be considered to be excessive.

8.3 In a further submission dated 7 June 1996, the State party notes that Mr. Henry died of cancer and that he received regular treatment for his medical condition. It submits that the author received medical attention for various complaints from the prison medical officer, at Kingston General Hospital, at Spanish Town Health Centre, at Spanish Town Hospital and at the St. Jago Dental Clinic. It notes that the records show that those visits took place on 19 July 1985, 24 February and 18 March 1986, 15 April, 21, 22 and 24 November 1989, 11 October 1990 and 7 January 1993 (when the author was diagnosed as having cancer), 2 February, 15 April, 7 and 15 July, 23 August, 14 and 31 October, 10 November, and 6 December 1993. On 12 December 1993, the author died at Kingston Public Hospital. It is stated that the prison records indicate that whenever the author was prescribed a special diet, he received it.

8.4 The State party further submits that Mr. Henry received financial subsistence from relatives who visited him regularly, and if the author chose to spend that subsistence on food and medication, it was by his own choice and not because the institution failed to provide those to him. Finally, the State party contends that there is no trace of a report from a doctor at Kingston Hospital requesting that the author's detention regime be modified on the basis of his ill health. The State party therefore refutes that there has been a violation of articles 7 and 10, paragraph 1, of the Covenant in respect of the treatment the author received while on death row prior to his death.

8.5 By submission of 4 January 1996, counsel states that as Mr. Henry is deceased, it is impossible to ascertain why he failed to exercise his alleged right to claim legal aid. Counsel assumes that the late Mr. Henry was unable to obtain legal aid for the preliminary hearing because of the notoriously low remuneration rate for legal aid.

8.6 With respect to the issue of undue delay, counsel reiterates that five and a half years between arrest and appeal is excessive and in violation of articles 9, paragraph 3, and 14, paragraphs 3 (c) and 5 juncto 3 (c), of the Covenant.

8.7 In a further submission, dated 10 July 1996, counsel refutes the State party's contention that the author received adequate treatment for his cancer.

In this respect, counsel contends that by the State party's own admission, the author only began to receive treatment for his cancer in 1993 whereas he had been diagnosed for cancer in 1989; counsel, however, fails to produce any evidence.

Examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol.

9.2 As regards Mr. Henry's claim that he was not represented by legal counsel during the preliminary enquiry, the Committee notes that the State party argues that that was by Mr. Henry's own choice and that the State party cannot be held responsible for Mr. Henry's decision not to engage counsel. Mr. Henry was represented by private counsel during the trial and there is no indication that Mr. Henry's lack of counsel during the preliminary hearing was due to his inability to pay for counsel.

9.3 With respect to the claim of "undue delay" in the judicial proceedings against the authors, two issues arise. The authors contend that their right, under articles 9, paragraph 3, and 14, paragraph 3 (c), of the Covenant to be tried without "undue delay" was violated because two years and six months elapsed between their arrest and the opening of the trial. The Committee reaffirms, as it did in its general comment No. 13 (21), on article 14, that all stages of the judicial proceedings should take place without undue delay and concludes that a lapse of 30 months between arrest and the start of the trial constituted in itself undue delay and cannot be deemed compatible with the provisions of articles 9, paragraph 3, and 14, paragraph 3 (c), in the absence of any explanation from the State party justifying the delay or explaining why the pretrial investigations could not have been concluded earlier.

9.4 Regarding the delay in the hearing of the appeal, and bearing in mind that this is a capital case, the Committee notes that a delay of three years and four and a half months between the conclusion of the trial on 13 June 1983 and the dismissal of the authors' appeal on 31 October 1986 is incompatible with the provisions of the Covenant, in the absence of any explanation from the State party justifying the delay; the mere affirmation that the delay was not excessive does not suffice. The Committee accordingly concludes that there has been a violation of article 14, paragraph [illegible] juncto 3 (c), of the Covenant.

9.5 With regard to the authors' claim of ill-treatment on death row, and in Mr. Henry's case prior to his death, two separate issues arise: the ill-treatment each author was subjected to while detained on death row, including, in Mr. Henry's case, being kept in a cold cell after being diagnosed for cancer and, in Mr. Douglas' case, having medical problems caused by a gunshot wound. Those allegations have not been contested by the State party. In the absence of a response from the State party, the Committee must give appropriate weight to those allegations, to the extent that they have been substantiated. In the opinion of the Committee, therefore, the conditions of incarceration under which Mr. Henry continued to be held until his death, even after the prison authorities were aware of his terminal illness, and the lack of medical attention, for the gunshot wounds received by Mr. Douglas, reveal a violation of articles 7 and 10, paragraph 1, of the Covenant. As to Mr. Henry's claim that he did not receive adequate medical attention for his cancer, the State party

has forwarded a report which shows that the author did visit various hospitals and received medical treatment for his cancer, including chemotherapy. With regard to the contention of counsel for Mr. Henry that the author's cancer had been diagnosed in 1989 rather than in 1993, as asserted by the State party, the Committee concludes that counsel for Mr. Henry has failed to produce any evidence to support the contention. In this respect, the Committee finds that there has been no violation of articles 7 and 10, paragraph 1, of the Covenant on this count.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7; 9, paragraph 3; 10, paragraph 1; and 14, paragraphs 3 (c) and 5 juncto 3 (c), of the Covenant with respect to both authors.

11. In capital punishment cases, the obligation of States parties to observe rigorously all guarantees for a fair trial set out in article 14 of the Covenant admits no exceptions. The delays in the proceeding constitute a violation of article 14, paragraphs 3 (c) and 5 juncto 3 (c) of the Covenant; thus, Eustace Henry and Everald Douglas did not receive a fair trial within the meaning of the Covenant. Consequently, they are entitled, under article 2, paragraph 3 (a), of the Covenant to an effective remedy. The Committee has taken note of the commutation of Mr. Douglas' death sentence, but it is of the view that in the circumstances of the case, the remedy should be the author's early release. In the case of Mr. Henry, the remedy should entail compensation to the author's family. The State party is under an obligation to ensure that similar events do not occur in the future.

12. Pursuant to article 2, paragraph 3 (a), of the Covenant, Mr. Douglas is entitled to an effective remedy, entailing compensation, for the conditions of his detention, in particular for the inadequate medical attention he received. The Committee reaffirms that the obligation to treat individuals deprived of their liberty with respect for the inherent dignity of the human person encompasses the provision of adequate medical care during detention; that obligation obviously extends to persons under sentence of death. The State party is under an obligation to ensure that similar events do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] In this context, counsel refers to articles 9, 19, 21, 25 and 26 of the Standard Minimum Rules for the Treatment of Prisoners and to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. See Human Rights: A Compilation of International Instruments, vol. I (first part), sect. H (United Nations publication, Sales No. E.93.XIV.1).

[b] See, for example, Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.J, communication No. 283/1988 (Little v. Jamaica), views adopted on 1 November 1991; and ibid., Forty-ninth Session, Supplement No. 40 (A/49/40), vol. II, annex IX.A, communication No. 321/1988 (Thomas v. Jamaica), views adopted on 19 October 1993, and annex IX.G, communication No. 352/1989 (Douglas, Gentles and Kerr v. Jamaica), views adopted on 19 October 1993.

V. Communication No. 586/1994, Josef Frank Adam v. the Czech Republic (views adopted on 23 July 1996, fifty-seventh session)*

Submitted by: Joseph Frank Adam [represented by counsel]

Alleged victim: The author

State party: The Czech Republic

Date of communication: 14 March 1994 (initial submission)

Date of decision on admissibility: 16 March 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 July 1996,

Having concluded its consideration of communication No. 589/1994, submitted to the Human Rights Committee by Mr. Joseph Frank Adam under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Joseph Frank Adam, an Australian citizen, born in Australia of Czech parents, residing in Melbourne, Australia. He submits the communication on his own behalf and on that of his two brothers, John and Louis. He claims that they are victims of a violation of article 26 of the International Covenant on Civil and Political Rights by the Czech Republic. The Optional Protocol entered into force for the Czech Republic on 12 June 1991.[a]

The facts as submitted by the authors

2.1 The author's father, Vlatislav Adam, was a Czech citizen, whose property and business were confiscated by the Czechoslovak Government in 1949. Mr. Adam fled the country and eventually moved to Australia, where his three sons, including the author of the communication, were born. In 1985, Vlatislav Adam died and, in his last will and testament, left his Czech property to his sons. Since then, the sons have been trying in vain to have their property returned to them.

2.2 In 1991, the Czech and Slovak Republic enacted a law rehabilitating Czech citizens who had left the country under Communist pressure and providing for restitution of their property or compensation for the loss thereof. On 6 December 1991, the author and his brothers, through Czech solicitors, submitted a claim for restitution of their property. Their claim was rejected on the grounds that they did not fulfil the then applicable dual requirement of Act 87/91 that applicants have Czech citizenship and be permanent residents in the Czech Republic.

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* The text of an individual opinion of one Committee member is appended.

2.3 Since the rejection of their claim, the author has on several occasions petitioned the Czech authorities, explaining his situation and seeking a solution, all to no avail. The authorities in their replies refer to the legislation in force and argue that the provisions of the law, limiting restitution and compensation to Czech citizens are necessary and apply uniformly to all potential claimants.

The complaint

3. The author claims that the application of the provision of the law, that property be returned or its loss be compensated only when claimants are Czech citizens, makes him and his brothers victims of discrimination under article 26 of the Covenant.

The State party's observations and the author's comments

4.1 On 23 August 1994, the communication was transmitted to the State party under rule 91 of the Committee's rules of procedure.

4.2 In its submission dated 17 October 1994, the State party states that the remedies in civil proceedings such as that applicable in the case of Mr. Adam are regulated by Act No. 99/1963, by the Code of Civil Procedure as amended, in particular by Act No. 519/1991 and Act No. 263/1992.

4.3 The State party quotes the texts of several sections of the law, without, however, explaining how the author should have availed himself of those provisions. It concludes that since 1 July 1993, Act No. 182/1993, on the Constitutional Court, stipulates the citizens' right to appeal also to the Constitutional Court of the Czech Republic. Finally, Mr. Adam did not make use of the possibility of filing a claim before the Constitutional Court.

5.1 By letter of 7 November 1994, the author informs the Committee that the State party is trying to circumvent his rights by placing his property and business on sale.

5.2 By letter of 5 February 1995, the author contests the relevance of the State party's general information and reiterates that his lawyers in Czechoslovakia have been trying to obtain his property since his father died in 1985. He submits that as long as Czech law requires claimants to be Czech citizens, there is no way that he can successfully claim his father's property in the Czech courts.

The Committee's decision on admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee observed ratione materiae that although the author's claims relate to property rights, which are not themselves protected in the Covenant, he also alleges that the confiscations under prior Czechoslovak governments were discriminatory and that the new legislation of the Czech Republic discriminates against persons who are not Czech citizens. Therefore, the facts of the communication appear to raise an issue under article 26 of the Covenant.

6.3 The Committee has also considered whether the violations alleged can be examined ratione temporis. It notes that although the confiscations took place before the entry into force of the Covenant and of the Optional Protocol for the Czech Republic, the new legislation that excludes claimants who are not Czech citizens has continuing consequences subsequent to the entry into force of the Optional Protocol for the Czech Republic, which could entail discrimination in violation of article 26 of the Covenant.

6.4 Article 5, paragraph 2 (a), of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. In this connection, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.5 With respect to the requirement of exhaustion of domestic remedies, the Committee recalls that only such remedies have to be exhausted which are both available and effective. The applicable law on confiscated property does not allow for restoration or compensation to the author. Moreover, the Committee notes that the author has been trying to recover his property since his father died in 1985 and that the application of domestic remedies can be deemed, in the circumstances, unreasonably prolonged.

7. Based on those considerations, the Human Rights Committee decided on 16 March 1995 that the communication was admissible inasmuch as it may raise issues under article 26 of the Covenant.

Observations of the State party

8.1 By note verbale of 10 November 1995, the State party reiterates its objections to the admissibility of the communication, in particular that the author has not availed himself of all national legal remedies.

8.2 It argues that the author is an Australian citizen permanently resident in Australia. As to the alleged confiscation of his father's property in 1949, the State party explains that the Decree of the President of the Republic No. 5/1945 did not represent the conveyance of the ownership title to the State but only restricted the owner in exercising his ownership right.

8.3 The author's father, Vlatislav Adam, was a citizen of Czechoslovakia and left the country for Australia, where the author was born. If indeed Vlatislav Adam willed his Czech property to his sons by virtue of his testament, it is not clear whether he owned any Czech property in 1985, and the author has not explained what steps, if any, he has taken to acquire the inheritance.

8.4 In 1991 the Czech and Slovak Federal Republic adopted a law (Act No. 87/1991) on extrajudicial rehabilitations which rehabilitates Czech citizens who left the country under Communist oppression, and stipulates the restitution of their property and compensation for their loss. On 6 December 1991, the author and his brothers claimed the restitution of their property. Their claim was rejected because they were not persons entitled to the recovery of property pursuant to the Extrajudicial Rehabilitation Act, since they did not satisfy the conditions of citizenship of the Czech Republic and of permanent residence there. The author failed to invoke remedies available against the decision denying him restitution. Moreover, the author failed to observe the legal six-month term to claim his property, the statute of limitations having ended on 1 October 1991. Nevertheless, pursuant to article 5, paragraph 4, of the

Extrajudicial Rehabilitation Act, the author could have filed his claims in court until 1 April 1992, but he did not do so.

8.5 The author explains that his attorney felt that there were no effective remedies and that was why they did not pursue their appeals. That subjective assessment is irrelevant to the objective existence of remedies. In particular, he could have lodged a complaint with the Constitutional Court.

8.6 Czech constitutional law, including the Charter of Fundamental Rights and Freedoms, protects the right to own property and guarantees inheritance. Expropriation is possible only in the public interest and on the basis of law, and is subject to compensation.

8.7 The Extrajudicial Rehabilitation Act was amended in order to eliminate the requirement of permanent residence; that occurred pursuant to a finding of the Constitutional Court of the Czech Republic of 12 July 1994. Moreover, in cases in which the real estate cannot be surrendered, financial compensation is available.

8.8 Articles 1 and 3 of the Charter of Fundamental Rights and Freedoms stipulate equality in the enjoyment of rights and prohibits discrimination. The right to judicial protection is regulated in article 36 of the Charter. The Constitutional Court decides about the abrogation of laws or of their individual provisions if they are in contradiction with a constitutional law or international treaty. A natural person or legal entity is entitled to file a constitutional complaint.

8.9 The author not only failed to invoke the relevant provisions of the Extrajudicial Rehabilitation Act in a timely fashion. He could also have lodged a claim to domestic judicial authorities based on the direct applicability of the International Covenant on Civil and Political Rights, with reference to article 10 of the Constitution, article 36 of the Charter of Fundamental Rights and Freedoms, articles 72 and 74 of the Constitutional Court Act, and article 3 of the Civil Procedure Code. If the author had availed himself of those procedures and if he had not been satisfied with the result, he could still have sought review of legal regulations pursuant to the Constitutional Court Act.

9.1 The State party also endeavours to explain the broader political and legal circumstances of the case and contends that the author's presentation of the facts is misleading. After the democratization process begun in November 1989, the Czech and Slovak Republic, and subsequently the Czech Republic, made a considerable effort to remove some of the property injustices caused by the communist regime. The endeavour to return property, as stipulated in the Rehabilitation Act, was in part a voluntary and moral act of the Government and not a duty or legal obligation. "It is also necessary to point out the fact that it was not possible and, with regard to the protection of the justified interests of the citizens of the present Czech Republic, even undesirable, to remove all injuries caused by the past regime over a period of forty years."

9.2 The precondition of citizenship for restitution or compensation should not be interpreted as a violation of the prohibition of discrimination pursuant to article 26 of the Covenant. "The possibility of explicit restriction to acquiring the ownership of certain property by only some persons is contained in article 11, paragraph 2, of the Charter of Fundamental Rights and Freedoms. This article states that the law may determine that certain property may only be owned by citizens or legal entities having their seat in the Czech and Slovak Federal Republic. In this respect, the Charter speaks of citizens of the Czech

and Slovak Federal Republic, and after January 1, 1993, of citizens of the Czech Republic."

9.3 The Czech Republic considers the restriction to exercising rights of ownership by imposing the condition of citizenship to be legitimate. In this connection, it refers not only to article 3, paragraph 1, of the Charter of Fundamental Rights and Freedoms, containing the non-discrimination clause, but above all to the relevant clauses of international human rights treaties.

The author's comments

10.1 As to the facts of the claim, the author explains that in January 1949 his father was ordered out of his business, which was confiscated. He had to hand over the books and the bank accounts and was not even able to take his own personal belongings. As to his departure from Czechoslovakia, he was not able to emigrate legally but had to cross the border illegally into West Germany, where he remained in a refugee camp for a year before being able to emigrate to Australia.

10.2 He disputes the State party's contention that he did not avail himself of domestic remedies. He reiterates that he himself and his attorneys in Prague have tried to assert the claim to inheritance since his father died, in 1985, without success. In December 1991, he and his brothers submitted their claim, which was rejected for lack of citizenship and permanent residence. Moreover, their claim was by virtue of inheritance. He further complains about unreasonably prolonged proceedings in the Czech Republic, in particular that whereas their letters to the Czech Government reached the Czech authorities within a week, the replies took 3 to 4 months.

10.3 As to their Czech citizenship, they claim that the consulate in Australia informed them that if both mother and father were Czech citizens, the children were automatically Czech citizens. However, the Czech Government subsequently denied that interpretation of the law.

Review of admissibility

11.1 The State party has requested that the Committee revise its decision on admissibility on the grounds that the author has not exhausted domestic remedies. The Committee has taken into consideration all arguments presented by the State party and the explanations given by the author. In the circumstances of this case, considering that the author is abroad and that his lawyers are in the Czech Republic, it would seem that the imposition of a strict statute of limitations for lodgings claims by persons abroad is unreasonable. In the author's case, the Committee has taken into account the circumstance that he has been trying to assert his inheritance claim since 1985 and that his Prague attorneys have been unsuccessful, ultimately not because of the statute of limitations but because the Rehabilitation Act, as amended, stipulates that only citizens can claim restitution or compensation. Since the author, according to his last submission, which has not been disputed by the State party (para. 10.3) is not a Czech citizen, he cannot invoke the Rehabilitation Act in order to obtain the return of his father's property.

11.2 In the absence of legislation enabling the author to claim restitution, recourse to the Constitutional Court cannot be considered an available and effective remedy for purposes of article 5, paragraph 2 (b), of the Optional Protocol. In the circumstances of this case, such a remedy must be considered as an extraordinary remedy, since the right being challenged is not a

constitutional right to restitution as such, bearing in mind that the Czech and Slovak legislature considered the 1991 Rehabilitation Act to be a measure of moral rehabilitation rather than a legal obligation (para. 9.1). Moreover, the State has argued that it is compatible with the Czech Constitution and in keeping with Czech public policy to restrict the ownership of property to citizens.

11.3 Under these circumstances, the Committee finds no reason to set aside its decision on admissibility of 16 March 1995.

Examination of the merits

12.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

12.2 The communication was declared admissible only insofar as it may raise issues under article 26 of the Covenant. As the Committee has already explained in its decision on admissibility (para. 6.2 above), the right to property, as such, is not protected under the Covenant. However, a confiscation of private property or the failure of a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds, in violation of article 26 of the Covenant.

12.3 The issue before the Committee is whether the application of Act 87/1991 to the author and his brothers entailed a violation of their right to equality before the law and to the equal protection of the law. The Committee observes that the confiscations themselves are not here at issue but rather the denial of restitution to the author and his brothers, whereas other claimants under the Act have recovered their properties or received compensation therefor.

12.4 In the instant case, the author has been affected by the exclusionary effect of the requirement in Act 87/1991 that claimants be Czech citizens. The question before the Committee, therefore, is whether the precondition to restitution or compensation is compatible with the non-discrimination requirement of article 26 of the Covenant. In this context, the Committee reiterates its jurisprudence that not all differentiation in treatment can be deemed to be discriminatory under article 26 of the Covenant.[6] A differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.

12.5 In examining whether the conditions for restitution or compensation are compatible with the Covenant, the Committee must consider all relevant factors, including the original entitlement of the author's father to the property in question and the nature of the confiscation. The State party itself has acknowledged that the confiscations under the Communist governments were injurious and that is why specific legislation was enacted to provide for a form of restitution. The Committee observes that such legislation must not discriminate among the victims of the prior confiscations, since all victims are entitled to redress without arbitrary distinctions. Bearing in mind that the author's original entitlement to his property by virtue of inheritance was not predicated on citizenship, the Committee finds that the condition of citizenship in Act 87/1991 is unreasonable.

12.6 In this context, the Committee recalls its rationale in its views on communication No. 516/1992 (Simunek et al. v. the Czech Republic), adopted on 19 July 1995,[c] in which it considered that the authors in that case and many others in analogous situations had left Czechoslovakia because of their political opinions and had sought refuge from political persecution in other countries, where they eventually established permanent residence and obtained a new citizenship. Taking into account that the State party itself is responsible for the departure of the author's parents in 1949, it would be incompatible with the Covenant to require the author and his brothers to obtain Czech citizenship as a prerequisite for the restitution of their property or, alternatively, for the payment of appropriate compensation.

12.7 The State party contends that there is no violation of the Covenant because the Czech and Slovak legislators had no discriminatory intent at the time of the adoption of Act 87/1991. The Committee is of the view, however, that the intent of the legislature is not dispositive in determining a breach of article 26 of the Covenant, but rather the consequences of the enacted legislation. Whatever the motivation or intent of the legislature, a law may still contravene article 26 of the Covenant if its effects are discriminatory.

12.8 In the light of the above considerations, the Committee concludes that Act 87/1991 and the continued practice of non-restitution to non-citizens of the Czech Republic have had effects upon the author and his brothers that violate their rights under article 26 of the Covenant.

13.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the denial of restitution or compensation to the author and his brothers constitutes a violation of article 26 of the International Covenant on Civil and Political Rights.

13.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his brothers with an effective remedy, which may be compensation if the property in question cannot be returned. The Committee further encourages the State party to review its relevant legislation to ensure that neither the law itself nor its application is discriminatory.

13.3 Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] The Czech and Slovak Federal Republic ratified the Optional Protocol in March 1991, but on 31 December 1992 the Czech and Slovak Federal Republic ceased to exist. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

[b] See Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40), annex VIII.D, communication No. 182/1994, (Zwaan-de Vries v. the Netherlands), views adopted on 9 April 1987, para. 13.

[f] Ibid., Fiftieth Session, Supplement No. 40 (A/50/40), vol. II, annex X.K.

Appendix

[Original: English]

Individual opinion of Committee member Nisuke Ando

Considering the Human Rights Committee's views on communication No. 516/1992, I do not oppose the adoption by the Committee of the views in the instant case. However, I would like to point to the following:

First, under current rules of general international law, States are free to choose their economic system. As a matter of fact, when the United Nations adopted the International Covenant on Civil and Political Rights in 1966, the then Socialist States were managing planned economies under which private ownership was largely restricted or prohibited in principle. Even nowadays not a few States parties to the Covenant, including those adopting marked-oriented economies, restrict or prohibit foreigners from private ownership of immovable properties in their territories.

Second, consequently, it is not impossible for a State party to limit the ownership of immovable properties in its territory to its nationals or citizens, thereby precluding their wives or children of different nationality or citizenship from inheriting or succeeding to those properties. Such inheritance or succession is regulated by rules of private international law of the States concerned, and I am not aware of any universally recognized "absolute right of inheritance or of succession to private property".

Third, while the International Covenant on Civil and Political Rights enshrines the principle of non-discrimination and equality before the law, it does not prohibit "legitimate distinctions" based on objective and reasonable criteria. Nor does the Covenant define or protect economic rights as such. This means that the Human Rights Committee should exercise utmost caution in dealing with questions of discrimination in the economic field. For example, restrictions or prohibitions of certain economic rights, including the right of inheritance or succession, which are based on nationality or citizenship, may well be justified as legitimate distinctions.

(Signed) Nisuke Ando

W. Communication No. 588/1994, Errol Johnson v. Jamaica (views adopted on 22 March 1996, fifty-sixth session)*

Submitted by: Errol Johnson [represented by counsel]

Victim: The author

State party: Jamaica

Date of communication: 11 January 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 March 1996,

Having concluded its consideration of communication No. 588/1994, submitted to the Human Rights Committee by Mr. Errol Johnson under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Errol Johnson, a Jamaican citizen who, at the time of submission of his communication, was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7, 10, paragraph 1, and 14, paragraphs 1, 3 (c) and (g) and 5, of the International Covenant on Civil and Political Rights. The author is represented by counsel. In early 1995, the offence of which the author was convicted was classified as non-capital murder and his death sentence was commuted to life imprisonment on 16 March 1995.

The facts as presented by the author

2.1 The author, together with a co-defendant, Irvine Reynolds, was convicted of the murder of Reginald Campbell and sentenced to death on 15 December 1983 in the Clarendon Circuit Court. His application for leave to appeal was dismissed by the Court of Appeal on 29 February 1988; a reasoned appeal judgement was issued on 14 March 1988. On 9 July 1992, at separate hearings, the Judicial Committee of the Privy Council dismissed the petitions of the author and of Mr. Reynolds for special leave to appeal.

2.2 Reginald Campbell, a shopkeeper, was found dead in his shop at around 9 a.m. on 31 October 1982. The post-mortem evidence showed that he died of stab wounds to the neck. A witness for the prosecution testified that, earlier in the morning at approximately 6 a.m., he had seen Mr. Campbell in his garden, as well as two men who were waiting in the vicinity of the shop. At an identification parade held on 11 November 1982, the witness identified Mr. Reynolds but not the author as one of the men who had been waiting near the shop. Another prosecution witness testified that about one hour later on the same morning, he met Irvine Reynolds, whom he knew, and the author, whom he

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* Pursuant to rule 85 of the rules of procedure, Committee member Laurel Francis did not take part in the adoption of the views. Three individual opinions of six Committee members are appended.

identified at an identification parade, coming from the direction of Campbell's shop. He walked with them for about two miles, observing that Reynolds played with a knife, that both men were carrying travel bags and that both were behaving in a suspicious way. Thus, when a minibus was approaching them from the opposite direction, Reynolds scurried up the road embankment, as if trying to hide.

2.3 The prosecution further relied on evidence discovered by the police during a search of the rooms in which the author and Mr. Reynolds were living, in particular four cheques signed by Mr. Campbell, as well as items such as running shoes and detergent similar to those stolen from the shop. Furthermore, a caution statement allegedly made by Mr. Johnson to the police on 12 November 1982 was admitted into evidence after the voir dire; in it, the author declared that Mr. Reynolds had walked into the store to buy cigarettes, while he waited outside. He then heard a noise, went into the shop and saw Mr. Campbell bleeding on the ground, with Mr. Reynolds holding a knife, standing aside.

2.4 During the trial, the author and Mr. Reynolds presented an alibi defence. During the voir dire, the author denied under oath that he had dictated the above-mentioned statement to the police and claimed that he had been forced to sign a prepared statement. He further testified that, after he had told the investigating officer that he refused to sign the statement until his legal representative had seen it, he was taken to the guards' room. There, an investigating officer, Inspector B., hit him four times on the knees with a baton; when he bent over, he was kicked in the stomach and hit on his head. He stated that blood was trickling down his ear when he signed the statement. That evidence was corroborated by Reynolds who, in an unsworn statement from the dock, noted that he had seen the author with blood running down the side of his head when walking past the guards' room. The investigating officers were cross-examined on the issue of ill-treatment by the defence during the voir dire, as well as in the presence of the jury.

2.5 At the close of the prosecution's case, the author's lawyer, a Queen's counsel, argued that there was no case to answer, as the evidence went no further than showing that Errol Johnson had been present in the vicinity of the shop at the time of the murder. The judge rejected the no-case submission.

2.6 On appeal, the author's lawyer argued that the judge had failed to adequately direct the jury on the caution statement, so that the possibility of reaching a verdict of manslaughter was not left for its consideration. In counsel's opinion, the caution statement showed that, while the author was present at the scene, he was not a party to the crime. The Court of Appeal dismissed the argument, stating that "[t]he value of the statement was to rebut his alibi and to put him at the scene of the crime".

2.7 The main grounds on which the author's further petition for special leave to appeal to the Judicial Committee of the Privy Council was based were that:

- The trial judge erred in law in rejecting the "no case to answer" submission, where evidence produced by the prosecution was not capable of proving either that the author had himself committed the murder or that he had participated in a joint enterprise which would have made him guilty of murder or manslaughter; and

- The direction of the judge on the nature of joint enterprise was confused, and he failed to direct the jury properly as to which

findings of fact arising in the case could give rise to a verdict of manslaughter.

2.8 Counsel notes that the author did not apply to the Supreme (Constitutional) Court of Jamaica for constitutional redress, as a constitutional motion would fail in the light of the precedents in the case law of the Judicial Committee, notably in the cases of D.P.P. v. Nasralla (2 All E.R. 161 (1967)) and Riley et al. v. Attorney-General of Jamaica (2 All E.R. 469 (1982)), where it held that the Constitution of Jamaica intended to prevent the enactment of unjust laws and not merely, as claimed by the applicants, unfair treatment under the law. Furthermore, even if it were considered that a constitutional remedy was available to the author in theory, it would be unavailable to him in practice since he lacks the resources to secure private legal representation and no legal aid is made available for the purpose of constitutional motions. Reference is made in this context to the established jurisprudence of the Committee.

The complaint

3.1 It is argued that the author was detained on death row for over 10 years and that if he were to be executed after such a delay, that would amount to cruel and degrading treatment or punishment, in violation of article 7 of the Covenant. In substantiation of his claim, counsel refers to the findings of the Judicial Committee of the Privy Council in Pratt and Morgan v. Attorney-General of Jamaica and of the Supreme Court of Zimbabwe in a recent case. The fact that the author was held on death row for so long under the appalling conditions of detention at St. Catherine District Prison is said to amount in itself to a violation of article 7.

3.2 Counsel contends that the beatings to which his client was subjected during police interrogation amount to a violation of articles 7 and 10, paragraph 1, of the Covenant. He recalls that the author did inform his lawyer about the beatings, that the lawyer raised the issue during the trial, that the author himself repeated his claim in a sworn and an unsworn statement during the trial, and that his co-defendant corroborated his version. By reference to the Committee's jurisprudence[a] counsel argues that the physical and psychological pressure exercised by the investigating officers on the author, aimed at obtaining a confession of guilt, violates article 14, paragraph 3 (g), of the Covenant.

3.3 Counsel further alleges that the delay of 51 months between the author's trial and the dismissal of his appeal constituted a violation of article 14, paragraphs 3 (c) and 5, of the Covenant, and refers to examples of the Committee's jurisprudence on this issue.[b] He forwards a copy of a letter from the author's lawyer in Jamaica, who indicates that there was a long delay in the preparation of the trial transcript. It further transpires from correspondence between the author and the Jamaica Council for Human Rights that the Council was informed on 26 June 1986 that the author's appeal was still pending. On 10 June 1987, the Council asked the Registrar of the Court of Appeal to forward the Notes of Evidence in the case. That request was reiterated in November and December 1987. On 23 February 1988, the Council informed the author that it was unable to assist him, as it had still not received the trial transcript. The delays encountered in making available to the author the trial transcript and a reasoned summing-up of the judge are said to have effectively denied him his right to have his conviction and sentence reviewed by a higher tribunal, according to law.

3.4 It is further submitted that the trial judge's failure to direct the jury adequately as to which findings of facts arising in the case might have allowed a verdict of manslaughter amounted to a violation of article 14, paragraph 1, of the Covenant.

3.5 Finally, counsel argues that the imposition of a capital sentence upon completion of a trial in which the provisions of the Covenant were violated amounts to a violation of article 6, paragraph 2, of the Covenant, if no further appeal against the sentence is available.

The State party's information and observations and counsel's comments thereon

4.1 In its observations of 13 February 1995, the State party does not formulate objections to the admissibility of the case and offers, "in the interest of expedition and in the spirit of cooperation", comments on the merits of the communication.

4.2 With regard to the claim that the length of time spent on death row constitutes a violation of article 7 of the Covenant, the State party contends that the judgement of the Judicial Committee of the Privy Council of 2 November 1993 in Pratt and Morgan v. Attorney-General of Jamaica is not necessarily dispositive of all other cases in which a prisoner has been held on death row for over five years. Rather, each case must be considered on its merits. In support of its argument, the State party refers to the Committee's views in the case of Pratt and Morgan, in which it was held that delays in the judicial proceedings did not per se constitute cruel, inhuman and degrading treatment within the meaning of article 7.

4.3 The State party notes that it is investigating the author's allegations of ill-treatment during interrogation and promises to transmit its findings "as soon as the investigations are complete". As of 16 October 1995, the results of those investigations had not been forwarded to the Committee.

4.4 As to the delay of 51 months between the author's trial and the dismissal of his appeal, the State party equally states that it is investigating the reasons for the delay. As of 16 October 1995, it had not forwarded to the Committee the result of those investigations.

4.5 The State party denies a violation of article 14, paragraph 1, of the Covenant because of the inadequacy of the judge's instructions to the jury, and contends that that allegation relates to questions of facts and evidence in the case, the examination of which, under the Committee's own jurisprudence, is not generally within its competence. It further denies a violation of article 6, paragraph 2, of the Covenant without giving reasons.

5.1 In his comments on the State party's submission, counsel agrees to the joint examination of the admissibility and the merits of the case. He reaffirms that his client is a victim of a violation of articles 7 and 10, paragraph 1, of the Covenant because of the length of time he remained confined to death row. He claims that the judgement of the Judicial Committee of the Privy Council of 2 November 1993 in Pratt and Morgan does constitute a relevant judicial precedent.

5.2 In the latter context, counsel submits that any execution that took place more than five years after conviction would undoubtedly raise the "strong grounds" adduced by the Judicial Committee for believing that the delay would amount to inhuman and degrading treatment and punishment. He argues that on the

basis of the guidelines developed by the Judicial Committee, after a period of three and a half to five years from conviction, an assessment of the circumstances of each case, with reference to the length of delay, the prison conditions and the age and mental state of the applicant, could amount to inhuman and degrading treatment. He further contends that incarceration on death row for over five years would per se constitute cruel and degrading treatment.

Admissibility considerations and examination of the merits

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee observes that with the dismissal by the Judicial Committee of the Privy Council in July 1992 of the author's petition for special leave to appeal the author has exhausted domestic remedies for purposes of the Optional Protocol. The Committee notes that the State party has not raised objections to the admissibility of the complaint and has forwarded comments on the merits so as to expedite the procedure. The Committee recalls that article 4, paragraph 2, of the Optional Protocol stipulates that the receiving State shall submit its written observations on the merits of a communication within six months of the transmittal of the communication to it for comments on the merits. The Committee reiterates that that period may be shortened, in the interest of justice, if the State party so wishes.[c] The Committee further notes that counsel for the author has agreed to the examination of the case on the merits at this stage.

7. The Committee accordingly decides that the case is admissible and proceeds, without further delay, to an examination of the substance of the author's claims, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.1 The Committee first has to determine whether the length of the author's detention on death row since December 1983, i.e. over 11 years, amounts to a violation of articles 7 and 10, paragraph 1, of the Covenant. Counsel has alleged a violation of those articles merely by reference to the length of time Mr. Johnson has spent confined to the death row section of St. Catherine District Prison. While a period of detention on death row of well over 11 years is certainly a matter of serious concern, it remains the jurisprudence of this Committee that detention for a specific period of time does not amount to a violation of articles 7 and 10, paragraph 1, of the Covenant in the absence of some further compelling circumstances. The Committee is aware that its jurisprudence has given rise to controversy and wishes to set out its position in detail.

8.2 The question that must be addressed is whether the mere length of the period a condemned person spends confined to death row may constitute a violation by a State party of its obligations under articles 7 and 10 not to subject persons to cruel, inhuman and degrading treatment or punishment and to treat them with humanity. In addressing this question, the following factors must be considered:

(a) The Covenant does not prohibit the death penalty, although it subjects its use to severe restrictions. As detention on death row is a necessary consequence of imposing the death penalty, no matter how cruel, degrading and inhuman it may appear to be, it cannot, of itself, be regarded as a violation of articles 7 and 10 of the Covenant.

(b) While the Covenant does not prohibit the death penalty, the Committee has taken the view, which has been reflected in the Second Optional Protocol to the Covenant, that article 6 "refers generally to abolition in terms which strongly suggest that abolition is desirable".[3] Reducing recourse to the death penalty may therefore be seen as one of the objects and purposes of the Covenant.

(c) The provisions of the Covenant must be interpreted in the light of the Covenant's objects and purposes (article 31 of the Vienna Convention on the Law of Treaties). As one of those objects and purposes is to promote reduction in the use of the death penalty, an interpretation of a provision in the Covenant that may encourage a State party that retains the death penalty to make use of that penalty should, where possible, be avoided.

8.3 In light of these factors, we must examine the implications of holding the length of detention on death row per se to be in violation of articles 7 and 10. The first, and most serious, implication is that if a State party executes a condemned prisoner after he has spent a certain period of time on death row, it will not be in violation of its obligations under the Covenant, whereas if it refrains from doing so, it will violate the Covenant. An interpretation of the Covenant leading to this result cannot be consistent with the Covenant's object and purpose. The above implication cannot be avoided by refraining from determining a definite period of detention on death row, after which there will be a presumption that detention on death row constitutes cruel and inhuman punishment. Setting a cut-off date certainly exacerbates the problem and gives the State party a clear deadline for executing a person if it is to avoid violating its obligations under the Covenant. However, this implication is not a function of fixing the maximum permissible period of detention on death row, but of making the time factor per se the determining one. If the maximum acceptable period is left open, States parties which seek to avoid overstepping the deadline will be tempted to look to the decisions of the Committee in previous cases so as to determine what length of detention on death row the Committee has found permissible in the past.

8.4 The second implication of making the time factor per se the determining one, i.e. the factor that turns detention on death row into a violation of the Covenant, is that it conveys a message to States parties retaining the death penalty that they should carry out a capital sentence as expeditiously as possible after it was imposed. This is not a message the Committee would wish to convey to States parties. Life on death row, harsh as it may be, is preferable to death. Furthermore, experience shows that delays in carrying out the death penalty can be the necessary consequence of several factors, many of which may be attributable to the State party. Sometimes a moratorium is placed on executions while the whole question of the death penalty is under review. At other times the executive branch of government delays executions even though it is not feasible politically to abolish the death penalty. The Committee would wish to avoid adopting a line of jurisprudence which weakens the influence of factors that may very well lessen the number of prisoners actually executed. It should be stressed that by adopting the approach that prolonged detention on death row cannot, per se, be regarded as cruel and inhuman treatment or punishment under the Covenant, the Committee does not wish to convey the

impression that keeping condemned prisoners on death row for many years is an acceptable way of treating them. It is not. However, the cruelty of the death row phenomenon is first and foremost a function of the permissibility of capital punishment under the Covenant. That situation has unfortunate consequences.

8.5 Finally, to hold that prolonged detention on death row does not per se constitute a violation of articles 7 and 10 of the Covenant does not imply that other circumstances connected with detention on death row may not turn that detention into cruel, inhuman and degrading treatment or punishment. The jurisprudence of the Committee has been that where compelling circumstances of the detention are substantiated, that detention may constitute a violation of the Covenant. That jurisprudence should be maintained in future cases.

8.6 In the present case, neither the author nor his counsel has pointed to any compelling circumstances, over and above the length of the detention on death row, that would turn Mr. Johnson's detention into a violation of articles 7 and 10. The Committee therefore concludes that there has been no violation of those provisions.

8.7 Regarding the claim under articles 7 and 14, paragraph 3 (g) of the Covenant - i.e. that the author was beaten during police interrogation with a view to extracting a confession of guilt - the Committee reiterates that the wording of article 14, paragraph 3 (g), namely that no one shall "be compelled to testify against himself or to confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.° Although the author's claim has not been refuted by the State party, which promised to investigate the allegation but failed to forward its findings to the Committee, the Committee observes that the author's contention was challenged by the prosecution during the trial and his confession statement admitted by the judge. The Committee recalls that it must consider allegations of violations of the Covenant in the light of all the written information made available to it by the parties (article 5, paragraph 1, of the Optional Protocol); in the instant case, that material includes the trial transcript. The latter reveals that the author's allegation was thoroughly examined by the court in a voir dire, 28 pages of the trial transcript being devoted to that issue, and that his statement was subsequently admitted by the judge after careful weighing of the evidence; similarly, the jury concluded as to the voluntariness of the statement, thereby endorsing the judge's ruling that the author had not been ill-treated. There is no element in the file which allows the Committee to question the decision of the judge and the jury. It must further be noted that, on appeal, author's counsel accepted the voluntariness of Mr. Johnson's statement and used it to secure a reduction of the charge against his client from murder to manslaughter. On the basis of the above, the Committee concludes that there has been no violation of articles 7 and 14, paragraph 3 (g).

8.8 The author has alleged a violation of article 14, paragraphs 3 (c) and 5, of the Covenant because of an unreasonably long delay of 51 months between his conviction and the dismissal of his appeal. The State party promised to investigate the reasons for that delay but failed to forward to the Committee its findings. In particular, it has not shown that the delay was attributable to the author or to his legal representative. Rather, author's counsel has provided information which indicates that the author sought actively to pursue his appeal, and that responsibility for the delay in hearing the appeal must be attributed to the State party. In the Committee's opinion, a delay of four years and three months in hearing an appeal in a capital case is, barring

exceptional circumstances, unreasonably long and incompatible with article 14, paragraph 3 (c), of the Covenant. No exceptional circumstances which would justify the delay are discernible in the present case. Accordingly, there has been a violation of article 14, paragraphs 3 (c) and 5, inasmuch as the delay in making the trial transcript available to the author prevented him from having his appeal determined expeditiously.

8.9 The Committee reiterates that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, and which could no longer be remedied by appeal, constitutes a violation of article 6 of the Covenant. As the Committee noted in its general comment No. 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed ...".[f] Since the final sentence of death in the instant case was passed without having met the requirements for a fair trial set out in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 14, paragraphs 3 (c) and 5, and consequently of article 6 of the Covenant.

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. Aware of the commutation of the author's death sentence on 16 March 1995, the Committee considers that a further measure of clemency would be appropriate. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] See Official Records of the General Assembly, Forty-sixth Session, Supplement No. 40 (A/46/40), annex XI.D, communication No. 253/1987 (Kelly v. Jamaica), views adopted on 8 April 1991.

[b] Ibid., Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.B, communication No. 230/1987 (Henry v. Jamaica), views adopted on 1 November 1991, para. 8.4; ibid., Forty-eighth Session, Supplement No. 40 (A/48/40), vol. II, annex XII.E, communication No. 282/1988 (Smith v. Jamaica), views adopted on 31 March 1993, para. 10.5; and ibid., Forty-fourth Session, Supplement No. 40

(A/44/40), annex X.D, communication No. 203/1986 (Muñoz Hermoza v. Peru), views adopted on 4 November 1988, para. 11.3.

[c] Ibid., Fiftieth Session, Supplement No. 40 (A/50/40), vol. II, annex X.N, communication No. 606/1994 (Francis v. Jamaica), views adopted on 25 July 1995, para. 7.4.

[d] Ibid., Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, general comment No. 6 (16), para. 6; see also preamble to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (General Assembly resolution 44/128 of 15 December 1989).

[e] Ibid., Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.D, communication No. 248/1987 (Campbell v. Jamaica), views adopted on 30 March 1992, para. 6.7.

[f] Ibid., Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, para. 7.

Appendix

[Original: French]

A. Individual opinion of Committee member Christine Chanet

The development of the Committee's jurisprudence by a majority of its members in connection with the present communication prompts me not only to maintain the position I expressed in the Barrett and Sutcliffe case (Nos. 270 and 271/1988) through my individual opinion* but also to explain it in greater detail.

The views adopted in the present case have led the Committee, which wishes to remain consistent, to conclude that death row does not in itself constitute a violation of article 7 of the Covenant; in other words, it does not constitute cruel, inhuman or degrading treatment, irrespective of the length of time spent awaiting execution of the sentence, which may be 15 to 20 years or more.

There is nothing in the grounds for the decision that would enable the Committee, short of a complete reversal of its jurisprudence, to reach a different conclusion concerning an indefinite wait or a wait of several years.

The factors adduced in support of that position are as follows:

- The Covenant does not prohibit the death penalty;

- If the Covenant does not prohibit the death penalty, execution of that penalty cannot be prohibited;

- Before the execution can be carried out, some time must be allowed to elapse, in the interests of the convicted prisoner, who must have the opportunity to exhaust the relevant remedies;

- For the Committee to set a limit on this length of time would be to run the risk of provoking hasty execution. The Committee even goes so far as to state that life on death row is preferable to death.

However, the Committee, conscious of the risks of maximum application of such a view by States, recognizes that keeping a person under death sentence on death row for a number of years is not a good way of treating him.

The position is very debatable for the following reasons:

- It is true that the Covenant does not prohibit the death penalty;

- It logically follows from this that execution of the penalty is also not forbidden and that the existence of a death row, i.e. a certain period of time prior to execution, is in this sense inevitable.

On the other hand, one cannot rule out the conclusion that no time lag can constitute cruel, inhuman or degrading treatment by postulating that awaiting death is preferable to death itself and that any sign to the contrary emanating from the Committee would encourage the State to proceed with a hasty execution.

That reasoning may be considered excessively subjective on two counts. In an analysis of human behaviour, it is not exceptional to find that a person

suffering from an incurable illness, for example, prefers to take his own life rather than await the inevitably fatal outcome, thereby opting for immediate death rather than the psychological torture of a death foretold.

As to the "message" which the Committee refuses to send to States lest the setting of a time limit provoke hasty execution, that again is a subjective analysis in that the Committee is anticipating a supposed reaction by the State.

In my view, we should revert to basic considerations of humanity and bring the discussion back to the strictly legal level of the Covenant itself.

There is no point in trying to find what is preferable in this area. Unquestionably, the fact of knowing that one is to undergo the death penalty constitutes psychological torture. But is that a violation of article 7 of the Covenant? Is death row in itself cruel, inhuman or degrading treatment?

Some authors maintain that it is. However, that argument comes up against the fact that the death penalty is not prohibited in the Covenant, even though the Covenant's silence on this point can give rise to interpretations which are excluded under the European Convention on Human Rights, article 2, paragraph 1, of which explicitly provides for capital punishment as an admissible derogation from the right to life. The very existence of the Optional Protocol contradicts that argument.

I therefore believe that being on death row cannot in itself be considered as cruel, inhuman or degrading treatment. However, it must be assumed that the psychological torture inherent in that type of waiting must, if it is not to constitute a violation of article 7 of the Covenant, be reduced by the State to the minimum length of time necessary for the exercise of remedies.

Consequently, the State must institute remedies and prescribe reasonable time limits for exercising and examining them. Execution can only be concomitant with exhaustion of the last remedy; thus, in the system obtaining in France before the Act of 9 October 1981 abolishing the death penalty, the announcement of the execution was conveyed to the convicted prisoner at the actual time of execution, when he was told: "Your application for pardon has been refused."

This is not some kind of formula, since I believe there is no good way in which a State can deliberately end the life of a human being, coldly, and when that human being is aware of the fact. However, since the Covenant does not prohibit capital punishment, its imposition cannot be prohibited, but it is incumbent on the Human Rights Committee to ensure that the provisions of the Covenant as a whole are not violated on the occasion of the execution of the sentence.

Inevitably, each case must be judged on its merits: the physical and psychological treatment of the prisoner, his age and his health must be taken into consideration in order to evaluate the State's behaviour in respect of articles 7 and 10 of the Covenant. Similarly, the judicial procedure and the remedies available must meet the requirements of article 14 of the Covenant. Lastly, in the particular case, the State's legislation and behaviour and the conduct of the prisoner are elements providing a basis for determining whether or not the time lag between sentencing and execution is of a reasonable character.

Those are the limits to the subjectivity available to the Committee when exercising its control functions under the Covenant and the Optional Protocol, excluding factors such as what is preferable from the supposed standpoint of the prisoner, death or awaiting death, or fear of a possible misinterpretation by the State of the message contained in the Committee's decisions.

(Signed) Christine Chanet

Notes

[a] Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.F, appendix.

[Original: English]

B. Individual opinion of Committee members Prafullachandra Natwarlal Bhagwati, Marco Tulio Bruni Celli, Fausto Pocar and Julio Prado Vallejo

The development in the jurisprudence of the Committee with regard to the present communication obliges us to express views dissenting from those of the Committee majority. In several cases, the Committee decided that prolonged detention on death row does not per se constitute a violation of article 7 of the Covenant, and we could accept those decisions in the light of the specific circumstances of each communication under consideration.

The views adopted by the Committee in the present case reveal, however, a lack of flexibility that would not allow it to examine any more the circumstances of each case, so as to determine whether, in a given case, prolonged detention on death row constitutes cruel, inhuman or degrading treatment within the meaning of article 7 of the Covenant. The need of a case-by-case appreciation leads us to dissociate ourselves from the position of the majority and to associate ourselves with the opinion of other members of the Committee who were not able to accept the majority views, in particular the individual opinion formulated by Christine Chanet.

(Signed) Prafullachandra Natwarlal Bhagwati

Marco Tulio Bruni Celli

Fausto Pocar

Julio Prado Vallejo

[Original: Spanish]

C. Individual opinion of Committee member Francisco José Aguilar Urbina

The majority opinion on the present communication obliges me to express my individual opinion. The Committee has established in its jurisprudence that the death row phenomenon does not, per se, constitute a violation of article 7 of the Covenant. The Committee has repeatedly maintained that the mere fact of being sentenced to death does not constitute cruel, inhuman or degrading treatment or punishment. On some occasions, I have agreed with that position, subject to the proviso that, as I also wish to make clear in this individual opinion, I believe that capital punishment in itself constitutes inhuman, cruel and degrading punishment.

In my opinion, the Committee is wrong to seek inflexibly to maintain its jurisprudence without clarifying, analysing and appraising the facts before it on a case-by-case basis. In the present communication, the Committee's wish to be consistent with its previous jurisprudence has led it to rule that the length of detention on death row is not in any case contrary to article 7 of the Covenant.

The majority opinion seems to be based on the supposition that only a total reversal of the Committee's jurisprudence would allow it to decide that an excessively long stay on death row could entail a violation of that provision. In arriving at that conclusion, the majority made a number of assumptions:

1. That the International Covenant on Civil and Political Rights does not prohibit the death penalty, although it subjects its use to severe restrictions;

2. That detention on "death row" is a necessary consequence of imposing the death penalty and that, no matter how cruel, degrading and inhuman it may appear to be, it cannot, of itself, be regarded as a violation of articles 7 and 10 of the Covenant;

3. That, while the Covenant does not prohibit the death penalty, it refers to its abolition in terms which strongly suggest that abolition is desirable;

4. That the provisions of the Covenant must be interpreted in the light of the objects and purposes of that instrument and that, as one of those objects and purposes is to promote reduction in the use of the death penalty, an interpretation that may encourage a State to make use of that penalty should be avoided.

On the basis of those assumptions, a majority of the members of the Committee have arrived at certain conclusions which entail, in their opinion, a finding that there has been no violation of articles 7 and 10 of the Covenant on the part of the State that is the subject of the communication:

1. That a State party which executes a condemned person after he has spent a certain period of time awaiting execution would not be in violation of the provisions of the Covenant, whereas one which does not execute the prisoner would violate those provisions. This implies that the problem of length of detention on death row can be dealt with only by setting a cut-off date after which the Covenant would have been violated;

2. That making the time factor the one that determines a violation of the Covenant conveys a message to States parties that they should carry out a death sentence as expeditiously as possible after it is imposed;

3. That to hold that prolonged detention on death row does not, per se, constitute a violation of articles 7 and 10 of the Covenant does not imply that other circumstances connected with such detention may not turn it into cruel, inhuman or degrading punishment.

While subscribing to several of the arguments put forward by the majority, I agree with only the last of their conclusions. I consider the majority opinion debatable:

1. I agree that, while the Covenant does not prohibit the death penalty, it does subject its use to severe restrictions;

2. I also agree that, since capital punishment is not prohibited, States parties which still include it among their penalties are not prevented from applying it - within the strict limits set by the Covenant - and that the existence of "death row" (in other words, a certain period of time between the handing down of a death sentence and the execution of the condemned person) is, therefore, inevitable;

3. I also consider that there is no doubt that the Covenant suggests that abolition of the death penalty is desirable;

4. In any event, it cannot be denied that the provisions of the Covenant should be interpreted in the light of the object and purpose of that treaty. However, while I agree that one of the objects and purposes of the Covenant is to reduce the use of the death penalty, I believe that that is precisely as a consequence of a greater purpose, which is to limit the grounds for death sentences and, ultimately, to abolish the death penalty.

In the case of the present communication, and of the many which have been submitted against Jamaica during the last decade, it is regrettable that the State party, by refusing for the past 10 years to comply with its obligation to report to the Human Rights Committee under article 40 of the Covenant, has denied the Committee the opportunity to pronounce on the application of the death penalty in Jamaica as part of the procedure for consideration of reports. This means that, for 15 years, the Committee has been prevented from considering whether the death penalty is imposed in Jamaica in accordance with the strict limits imposed by the Covenant.

I do not, however, agree with the conclusion, at which the majority have arrived, that it is, therefore, preferable for a condemned person to endure being on death row, regardless in any case of the length of time spent there. The arguments of the majority are, in any case, subjective and do not represent an objective analysis of treaty norms.

In the first place, it is stated as a basic assumption that awaiting execution is preferable to execution itself. That argument cannot be valid since, as I have said, communications such as the one under consideration can be viewed only in the light of the attendant circumstances; in other words, they can be decided only on a case-by-case basis.

Furthermore, a claim such as that of the majority is completely subjective. It represents an analysis of human behaviour which expresses the feelings of the

members of the Committee but which cannot be applied across the board. For example, it would not be surprising if a person condemned to death who was suffering from a terminal or degenerative illness preferred to be executed rather than remain on death row. It is not surprising that some people commit murder for the purpose of having the death penalty imposed on them; for them, every day spent on death row constitutes real torture.

5. I also disagree with the position that, in this case, to rule that the excessive length of time which Errol Johnson spent on death row constitutes a violation of the Covenant would be to convey a 'message' to States parties that they should execute those condemned to death expeditiously. That, again, is a subjective opinion of the majority and represents the feelings of the Committee members rather than a legal analysis. Moreover, it presents the additional problem of defining a priori how States parties will behave.

In that regard, I also regret that the State party has not allowed the Committee to weigh its position on the imposition of the death penalty. Indeed, that is one of the facts which leads me to dissent from the majority opinion:

(a) I do not believe that it is possible to project the future behaviour of a State which has repeatedly refused to comply with its obligations under article 40 (submission of periodic reports), since the Committee has been unable to question the government authorities on that specific point;

(b) The ultimate result has been to benefit a State which, for at least a decade, has refused to comply with its treaty obligations, giving it the benefit of the doubt with regard to behaviour which should have been clarified under the procedure set forth in article 40.

The Committee is not competent to decide what would be preferable in cases like that of the present communication. Neither should it transform the communication into a mere hypothetical case in order to induce unspecified State officials to behave in a particular manner. Any opinion should be based on the concrete circumstances of Mr. Johnson's imprisonment.

Furthermore, any decision regarding the present communication should be taken on a strictly legal basis. There is no doubt that the certainty of death constitutes torture for the majority of people; the majority of those sentenced to death are in a similar position. Independently of the fact that it is my philosophical conviction that the death penalty, and therefore its corollaries (being sentenced to death and awaiting execution) constitute inhuman, cruel and degrading punishment, I must ask myself whether those facts - and, in a case such as this one, the phenomenon of death row - are in violation of the Covenant.

Any opinion comes up against the fact that the Covenant does not prohibit the death penalty. It cannot, therefore, be maintained that the death row phenomenon, per se, constitutes cruel, inhuman or degrading treatment. Nor can implementation of the death penalty be prohibited.

However, all States parties must minimize the psychological torture involved in awaiting execution. This means that the State must guarantee that the suffering to be endured by those awaiting execution will be reduced to the necessary minimum.

In that regard, the following guarantees are required:

1. The legal proceedings establishing the guilt of the person condemned to death must meet all the requirements laid down by article 14 of the Covenant;

2. The accused must have effective access to all necessary remedies until his guilt has been demonstrated beyond a doubt;

3. Reasonable time limits must be set for the exercise of those remedies and for their review by independent courts;

4. Execution cannot take place until the condemned person's last remedy has been exhausted and until the death sentence has acquired final binding effect;

5. While awaiting execution, the condemned person must at all times be duly accorded humane treatment; inter alia, he must not be subjected unnecessarily to the torture entailed by the fact of awaiting death.

The Human Rights Committee is responsible for ensuring that the provisions of the International Covenant on Civil and Political Rights are not violated as a consequence of the execution of a sentence. I therefore emphasize that the Committee must examine the circumstances on a case-by-case basis. The Committee must establish the physical and psychological conditions to which the condemned person has been subjected in order to determine whether the behaviour of the government authorities is in accordance with the provisions of articles 7 and 10 of the Covenant.

The Committee must therefore establish whether the laws and actions of the State, and the behaviour and conditions of the condemned person, make it possible to determine whether the time elapsed between sentencing and execution is reasonable and, on that basis, that it does not constitute a violation of the Covenant. These are the limits of the Committee's competence to determine whether there has been compliance with, or violation of, the provisions of the International Covenant on Civil and Political Rights.

(Signed) Francisco José Aguilar Urbina

Notes

* Jamaica was to have submitted its second periodic report on 1 August 1986 and 3 August 1991.

X. Communication No. 589/1994, Crafton Tomlin v. Jamaica (views adopted on 16 July 1996, fifty-seventh session)

Submitted by: Crafton Tomlin [represented by counsel]

Alleged victim: The author

State party: Jamaica

Date of communication: 26 January 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 July 1996,

Having concluded its consideration of communication No. 589/1994, submitted to the Human Rights Committee by Mr. Crafton Tomlin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Crafton Tomlin, a Jamaican citizen currently detained at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of article 14, paragraphs 1, 3 (b) and (e) and 5, and article 17, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel. The author's death sentence was commuted to life imprisonment on 4 December 1992.

The facts as submitted by the author

2.1 On 29 December 1988, at 5 p.m., the author turned himself in to the police for the killing of Devon Peart that same day at about 3 p.m. On 19 June 1989, he was convicted of murder in the Clarendon Circuit Court and sentenced to death. On 16 November 1990, the Court of Appeal of Jamaica dismissed his application for leave to appeal against his conviction. On 6 October 1992, his application for special leave to appeal to the Judicial Committee of the Privy Council was equally dismissed. Following the enactment of the Offences against the Person (Amendment) Act 1992, the author's offence was reviewed and reclassified as "non-capital murder". His sentence was accordingly commuted to life imprisonment, and the author becomes eligible for parole 15 years from the date of the review (4 December 1992).

2.2 During the trial, the prosecution and the defence gave conflicting accounts of the murder of Devon Peart, but it was accepted that the author had struck the fatal blow. According to the prosecution, the author had run up behind Mr. Peart and struck him in the back with a machete. No evidence of motive for the crime was offered. The author maintained that he had struck Mr. Peart from the front, in self-defence, after a confrontation in which Peart had threatened him with a machete.

2.3 The prosecution's main witness was the deceased's mother. She claimed that she had witnessed the incident, that there had been no confrontation and that

her son had never removed his own machete from his bag. It was undisputed that the deceased had been carrying a machete himself.

2.4 The medical evidence showed one machete wound extending from the deceased's right shoulder to his upper back, exposing the right lung; however, in court, the pathologist was not asked whether the wound was consistent or not with either the case of the prosecution or that of the defence.

2.5 On trial, the defence sought to argue that Mrs. Peart was either not giving an accurate account of events or that she was not present at the scene at the time of the incident. The author himself had reported the incident to the police; Mrs. Peart never did so. There was no dispute that Mrs. Peart was present some three hours after the incident; however, she claimed that, at that time, her son's machete was in his bag, whereas the defence suggested that she had removed the machete from his hand and placed it in his bag. Mrs. Peart admitted during the trial that she had attempted to remove the deceased's bag (containing his machete) from the scene, but was prevented from doing so by a bystander.

2.6 In addition to the statement the author gave to the police on the day of the incident, he made an unsworn statement during the trial.

The complaint

3.1 Counsel claims that, during the trial, the judge made comments prejudicial to Mr. Tomlin's case and that his directions to the jury were inadequate. Thus, during the cross-examination of Mrs. Peart by counsel for the defence, the judge observed, in the presence of the jury, that counsel's contention that Mrs. Peart had not been present at the scene of the crime was inconsistent with his earlier suggestion, to Mrs. Peart, that the author had acted in self-defence. Further, during the summing-up, the judge did not direct the jury to consider whether Mrs. Peart was in fact present at the material time but, on the contrary, directed them to consider why the defence was suggesting "these inconsistencies". Furthermore, the judge failed to direct the jury that they should consider the possibility that Mrs. Peart had removed her son's machete from his hand.

3.2 The trial judge attached great weight to the medical evidence and invited the jury to carry out experiments to ascertain whether the events could have occurred as suggested by the prosecution or as put forward by the defence. The judge emphasized the fact that the wound was confined to the deceased's right side, whereas the author had claimed that he had "chopped at" the deceased over his left shoulder. Counsel submits that that was an unsatisfactory direction, based on inadequate medical evidence.

3.3 After completing the summing-up, the judge recalled the jury from the jury room to give some further instructions, which counsel submits were without foundation and unduly prejudicial to his client: for example, the judge wrongly implied that there were inconsistencies between the author's statement to the police and his unsworn statement made during the trial.

3.4 Counsel submits that the author's right to have his conviction and sentence reviewed by a higher tribunal has been prejudiced as a result of the above, in violation of article 14, paragraph 5, of the Covenant.

3.5 Counsel also submits that, on appeal, the author's attorney pursued only one of four grounds of appeal, i.e, that the trial judge failed to put the issue

of manslaughter to the jury. It is submitted that other grounds of appeal, based on the above matters, should have been argued. Counsel claims that all of the above deprived the author of a fair trial, in violation of article 14, paragraph 1, of the Covenant.

3.6 It is further submitted that the author did not have the opportunity to discuss the details or background of his case with his privately retained attorney. Counsel submits that, as a result, the Court was not made aware of a possible motive for an attack on the author by the deceased. In addition, two witnesses who could have supported the author's case were not called to testify on his behalf during the trial. Those matters are said to constitute a violation of article 14, paragraph 3 (b) and (e), of the Covenant.

3.7 Counsel further argues that there has been arbitrary interference with the author's mail, in violation of article 17, paragraph 1, of the Covenant. In this respect, he refers to a letter dated 22 April 1991 from the author concerning his petition for special leave to appeal to the Judicial Committee of the Privy Council, which allegedly was not posted by the prison authorities until 10 July 1991.

The State party's information and observations on admissibility and the author's comments thereon

4.1 In its submission under rule 91, the State party does not object to the admissibility and offers observations on the merits of the case.

4.2 With regard to the claims that the weight attached to the medical evidence and the comments made by the trial judge during his summing-up, as well as those made during counsel's cross-examination of a witness, were prejudicial to the author, in violation of article 14, paragraph 1, of the Covenant, the State party contends that those matters relate to the evaluation of facts and evidence which, in accordance with the Committee's own jurisprudence, is for the appellate courts of States parties to assess and evaluate. The State party further contends that the fact that the author's counsel chose not to raise those issues on appeal merely reflects that counsel chose to exercise his professional judgement.

4.3 With respect to the claim that the author did not have adequate time to consult with his attorney, the State party contends that an argument of self-defence was put forward together with an attempt to challenge the honesty of a key prosecution witness, which belies the claim under article 14, paragraph 3 (b).

4.4 The State party denies that there has been a violation of article 14, paragraph 5. It submits that the author's case was examined by both the Court of Appeal and the Privy Council and that therefore it cannot be said that the author did not have sentence and conviction reviewed by a higher tribunal, according to law.

4.5 As to the author's allegation that he was a victim of a violation of article 17, paragraph 1, the State party submits that there is no evidence whatsoever of any arbitrary or unlawful interference with the author's correspondence.

5.1 In his comments on the State party's submission, counsel reaffirms that his client is a victim of violations of article 14, paragraphs 1, 3 (b) and 5. With respect to article 14, paragraph 1, counsel considers that the Committee should be allowed to evaluate the prejudicial effect of the deficiencies in the trial judge's instructions. With regard to the adequacy of time in which the author could meet and consult with his lawyer, counsel states that that does not simply mean providing adequate time for consultation between arrest and trial, but also adequate access during that time to a properly paid lawyer. Further, counsel restates that, as appellate courts do not usually re-examine findings of fact by the lower courts, the appeal was not properly examined.

5.2 Counsel states that, although the withholding of the author's correspondence for two and a half months appears to be an isolated incident, it must nonetheless be considered a violation of article 17, paragraph 1, of the Covenant.

Admissibility consideration and examination of merits

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 As regards the author's allegations relating to irregularities in the court proceedings, in particular improper instructions from the judge to the jury on the issue of medical evidence, the Committee recalls that it is generally for the appellate courts of States parties to the Covenant to evaluate the facts and evidence in a particular case; similarly, it is for the appellate courts and not for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author's allegations do not show that the judge's instructions suffered from such defects. In this respect, therefore, the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.4 The Committee observes that, with the dismissal by the Judicial Committee of the Privy Council in October 1992 of the author's petition for special leave to appeal, the author has exhausted domestic remedies for purposes of the Optional Protocol. In this context, it notes that the State party has not raised any objection to the admissibility of the complaint and has forwarded comments on the merits. The Committee recalls that article 4, paragraph 2, of the Optional Protocol stipulates that the receiving State shall submit its written observations on the merits of a communication within six months of the transmittal of the communication to it for comments on the merits. The Committee reiterates that that period may be shortened, in the interest of justice, if the State party so wishes. The Committee further notes that counsel for the author has agreed to the examination of the case on the merits at this stage.

7. In the circumstances of the case, the Committee decides that the other claims of the author are admissible and proceeds to an examination of the substance of those claims in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.1 The author has alleged a violation of article 14, paragraphs 3 (b) and (e) and 5, of the Covenant in that he was unable to adequately consult with his lawyer and to interrogate witnesses on his behalf, thus effectively denying him the right to have his sentence and conviction reviewed. The State party has replied that an argument of self-defence was advanced by counsel and that counsel merely exercised his professional judgement by not calling witnesses for the defence. The Committee considers that States parties cannot be held accountable for decisions that lawyers may choose to make when exercising their professional judgement, such as the calling and examination of witnesses on behalf of their client, unless it is manifestly evident that counsel acted in a manner contrary to his client's interests. Had counsel needed more time to prepare the case, he could have requested additional time or an adjournment; from the record it appears that no such request was made. By choosing not to do so, he once again exercised his professional judgement. On the basis of the information available, the Committee concludes that there has been no violation of article 14, paragraph 3 (b) and (e).

8.2 With respect to the contention that the author was not provided with the opportunity of an effective appeal since the Court of Appeal did not re-examine witnesses and because counsel did not advance the proper grounds of appeal, the Committee observes that those allegations do not in themselves support the contention that the author did not have a review of his sentence by a higher tribunal according to law. The right to have a conviction reviewed by a higher tribunal is not violated if counsel for an appellant chooses, in the exercise of his professional judgement, to concentrate on one arguable ground of appeal rather than advance several grounds. In the present case, the Committee concludes that there has been no violation of article 14, paragraph 5, of the Covenant.

8.3 Finally, the author has contended that his correspondence has been interfered with arbitrarily, in violation of his right to privacy. The State party contends that there is no evidence to support that claim. The Committee notes that the material before it does not reveal that the State party's authorities, in particular the prison administration, withheld the author's letter to counsel for a period exceeding two months. In this respect, it cannot be said that there was an "arbitrary" interference with the author's correspondence within the meaning of article 17, paragraph 1, of the Covenant. The Committee considers, however, that a delay of two and a half months in the transmittal of the author's letter to his counsel could raise an issue in respect of article 14, paragraph 3 (b) inasmuch as it could constitute a breach of the author's right to freely communicate with his counsel. Nevertheless, as this delay did not adversely affect the author's right to prepare adequately his defence, it cannot be considered to amount to a violation of article 14, paragraph 3 (b). After carefully weighing the information available to it, the Committee concludes that there has been no violation of either article 14 paragraph 3 (b), or of article 17, paragraph 1, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the provisions of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version.]

Y. Communication No. 596/1994, Dennie Chaplin v. Jamaica (views adopted on 2 November 1995, fifty-fifth session)*

Submitted by: Dennie Chaplin [represented by counsel]

Alleged victim: The author

State party: Jamaica

Date of communication: 12 August 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 November 1995,

Having concluded its consideration of communication No. 596/1994, submitted to the Human Rights Committee by Mr. Dennie Chaplin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Dennie Chaplin, a Jamaican citizen, currently detained at the South Camp Rehabilitation Centre, a prison in Kingston. At the time of submission, he was awaiting execution at St. Catherine District Prison. On 20 March 1995, his sentence was commuted to life imprisonment. He claims to be a victim of violations by Jamaica of articles 6, paragraph 2; 7; 10, paragraph 1; and 14, paragraph 3 (d) and (g), of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author was convicted, together with his co-defendants, Peter Grant and Howard Malcolm,[a] of the murder of Vincent Myrie and sentenced to death on 15 December 1988, by the St. James Circuit Court, Montego Bay, Jamaica. Their appeal was refused by the Court of Appeal of Jamaica on 16 July 1990. On 22 November 1993, the author's petition to the Judicial Committee of the Privy Council for special leave to appeal was dismissed.

2.2 It is contended by counsel that constitutional remedies are not, in practice, available to the author, who lacks financial means. Counsel therefore submits that all domestic remedies have been exhausted for purposes of the Optional Protocol and refers to the Committee's jurisprudence in similar cases.[b]

2.3 The case for the prosecution was that, on 18 June 1987, at 11:00 a.m., Myrie was stabbed in the back and bludgeoned with an iron bar and that petrol

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* The text of an individual opinion of two Committee members is appended.

was poured over him and then set alight. The prosecution's case was based on statements made by the accused to the police as well as on circumstantial evidence.

2.4 During the trial, Peter Grant's uncle testified that, on 19 June 1987, the author and Peter Grant had come to his home at about 7:00 a.m. to borrow a Red Morris Marina pick-up truck. Grant's uncle was unable to lend him the pick-up as he had promised it to Mr. Myrie. Grant and the author left, saying that they would arrange to borrow the car directly from Myrie. Another witness (S.W.) testified that at 8 a.m. she was given a lift from Johnson Town to Hopewell and that there were three other men in the truck; one she identified as Howard Malcolm. She also testified to seeing an iron bar protruding from the box in the back of the pick-up. A third witness (S.C.) testified that at 11:00 a.m., while walking along the Lithe road, she saw first a burning plastic jug on the side of the road and then noticed a red pick-up truck which passed her twice going in different directions. Finally, a petrol station attendant saw the pick-up at 1:00 p.m., at the petrol station in Ramble.

2.5 The author's aunt testified that he and Peter Grant had come to her place on 19 June 1987. The author told her that he was "Mix up in a little trouble", and asked to leave the pick-up at her premises; she agreed, and the author also left her the car keys and licence plates.

2.6 On 3 July 1987, the author was arrested. The author took the police to his aunt's home where the pick-up was recovered. Later that same day, at Montego Bay police station, the author gave a written statement to Sergeant Hart under caution, in the presence of a justice of the peace, Magistrate Allan Goodwill. In the statement, the author admitted participating in the murder and implicated Peter Grant and Howard Malcolm. Later, at the trial, the author affirmed that the statement had not been voluntary but rather that he had been tortured to procure the confession.

2.7 The author's co-accused, Peter Grant and Howard Malcolm, were arrested on 13 July and 2 July 1987, respectively, and gave statements to the police, testifying to their presence at the scene of the murder and implicating the author.

2.8 Although identification parades were held, the author was not identified. He was, however, identified during the trial by Peter Grant's uncle and by the petrol station attendant.

2.9 The statement given by the author was the object of a trial within the trial. After hearing the author, the judge also heard Magistrate Goodwill, Sergeant Hart and Corporal Brown, who denied that there had been duress. The judge admitted the statement into evidence.

2.10 At the trial, all three defendants gave statements from the dock denying their own participation but implicating the other two.

2.11 It is stated that the case has not been submitted to another procedure of international investigation or settlement.

The complaint

3.1 The author claims that the ill-treatment he was submitted to by the investigating officer in order that he sign a confession constitutes a violation of articles 7, 10, paragraph 1, and 14, paragraph 3 (g), of the Covenant. The author claims, through letters to counsel, that he was severely beaten with a steel cable and a club, that nails were driven through his fingers and that he was subjected to electric shock.

3.2 Counsel points out that the author was held on death row for six years awaiting execution. It is claimed that the "agony and suspense" derived from such a long period on death row constitutes cruel, inhuman and degrading treatment. Reference is made to the decision of the Judicial Committee of the Privy Council in the case of Pratt and Morgan v. Attorney-General of Jamaica,[3] in which it was held, inter alia, that the delay in carrying out the execution constitutes cruel, inhuman and degrading treatment. It is further submitted that the delay in this case is on its own sufficient to constitute a violation of articles 7 and 10, paragraph 1. It is further submitted that the conditions at St. Catherine District Prison amount to a violation of the author's rights under articles 7 and 10, paragraph 1. In this context, the author refers to an incident on 6 September 1992 during which he was allegedly beaten by a warder.[4]

3.3 It is further submitted that the author is the victim of a violation of article 14, paragraph 3 (d), of the Covenant, since the author was not represented at his appeal by a lawyer of his choice and since that lawyer did not advance all the grounds for appeal which the author would have wanted argued.

3.4 Counsel claims that the trial judge, in his summing-up, misdirected the jury as to the admissibility of the statement given by the author to the police. In this connection, counsel submits that once a statement has been admitted into evidence it is still for the jury to decide if they are satisfied that it was properly obtained. Counsel claims that any comment from the learned judge regarding the admissibility of the statement carries the risk of influencing the jury. It is submitted that the correct practice would have been for the judge to say nothing about having admitted the statement in evidence, but simply to tell the jury that they were to consider the statement themselves and decide if it could be relied upon. Moreover, it is argued that although the trial judge properly directed the jury in that a statement under caution of one defendant is not evidence against the other defendants, it was improper for him to compare and contrast the statements of the three defendants. Counsel claims that the judge's directions constitute a denial of justice, in violation of article 14, paragraph 1, of the Covenant.

The State party's observations

4.1 In its submission of 10 February 1995, the State party does not raise objections to the admissibility of the communication and addresses the merits, in order to expedite the disposition of the case.

4.2 The State party contests the author's allegations and denies, in particular, that he was subjected to any form of physical ill-treatment. In this context, reference is made to the trial within the trial which was conducted to determine whether the author's statement had been procured under duress. The State party contends that the examination of the matter by the

Jamaican courts is determinative, since it is an issue of fact and evidence upon which the Committee has emphasized that is not competent to adjudicate.

4.3 It is contended that the fact that the author was on death row for a period of five years prior to the commutation of his sentence does not constitute cruel and inhuman treatment. "This is not the principle stated in Pratt and Morgan v. Attorney-General of Jamaica. Instead it is the Ministry's view that the circumstances of each case must be examined in accordance with the applicable legal principles in order to arrive at the appropriate decision. This opinion is also found in the Committee's jurisprudence, particularly in the Pratt and Morgan v. Jamaica decision:° 'In principle prolonged judicial proceedings do not per se constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners.'"

4.4 As regards the allegation that the author was denied adequate time to prepare his defence and to communicate with counsel, as provided for in article 14 of the Covenant, the Ministry contends that the Government of Jamaica did nothing to prevent communication between the author and his attorneys. "It is clear that the obligations under the Covenant relate to actions or omission by the State which deprive an applicant of the rights set out therein. The breaches of those rights alleged by the author in respect of article 14 cannot be attributed to the State as they relate to the conduct of his defence by his attorneys. The State cannot accept responsibility for the conduct of a case by an attorney."

4.5 As to the author's allegations concerning the summing-up of the judge and the directions to the jury, the State party points out that those issues are matters which may properly be argued as grounds of appeal. Since the author failed to avail himself of the opportunity to have those issues dealt with on appeal, he cannot now argue that the judge's directions constitute a breach of article 14.

Counsel's comments

5.1 In his submission of 7 March 1995, counsel agrees to the examination of the merits at this stage.

5.2 With regard to the author's claim that he was subjected to torture and ill-treatment in order to force him to confess, author's counsel submits that the State party's blanket denial is no substitute for a proper investigation. The reference to an alleged absence of proof of any severe injury or permanent disability of the author is not supported by any medical evidence from the State party. Counsel stresses that the author has maintained his allegations of ill-treatment since he denounced them at trial, that he has given specific details of the forms of ill-treatment endured, including in correspondence to counsel ("all the marks can be seen on my body", letter of 10 June 1989), which was appended to the communication and submitted to the State party for its observations. No observations were forthcoming.

5.3 As to the "death row phenomenon", author's counsel refers to the judgement of the Judicial Committee of the Privy Council in Pratt and Morgan v. Attorney-General of Jamaica, holding that "in any case in which execution is to take place more than five years after sentence, there will be strong grounds for believing that the delay is such as to constitute inhuman and degrading punishment". The Judicial Committee further held that a State "must accept the

responsibility for ensuring that execution follows as swiftly as practical after sentence, allowing a reasonable time for appeal and consideration of reprieve".

5.4 Counsel further refers to the Committee's general comment on article 7, that when the death penalty is applied by the State party for the most serious crimes it must be carried out in such a way as to cause the least possible physical pain and suffering. Counsel submits that any execution that would take place more than five years after conviction would result in such pain and suffering, in violation of article 7.

5.5 With regard to the State party's accountability for the conduct of legal aid counsel, the author refers to the Committee's views adopted on 1 November 1991 in Little v. Jamaica (communication No. 283/1988), in which the Committee held that: "In cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time be granted to the accused and his counsel to prepare the defence for the trial."[f] Once assigned, legal aid counsel must provide "effective representation".

Decision on admissibility and examination of the merits

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes that the State party does not raise objections to the admissibility of the communication and has submitted its observations on the merits in order to expedite the procedure. The Committee further notes that counsel for the author agrees to the examination of the merits of the communication at this stage.

6.4 While prepared to declare the communication admissible, the Committee has nonetheless examined whether all of the author's allegations satisfy the Committee's well-established admissibility criteria.

6.5 With regard to the author's allegations that he was tortured in order to induce him to confess, the Committee notes that this was the subject of a trial within the trial to determine whether the author's statement was admissible evidence. In this connection, the Committee refers to its prior jurisprudence and reiterates that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case; it notes that the Jamaican courts examined the author's allegations and found that the statement had not been procured through duress. In the absence of a clear showing of bias or misconduct by the judge, the Committee cannot re-evaluate the facts and evidence underlying the judge's finding. Accordingly, that part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.6 With regard to the judge's instructions to the jury, the Committee reaffirms its jurisprudence that it is not within its competence to review specific instructions to the jury by a trial judge unless it can be ascertained that those instructions were clearly arbitrary or amounted to a denial of justice. The material before the Committee, including the written judgement of the Court of Appeals, does not show that the trial judge's instructions or the conduct of the trial suffered from such defects. Accordingly, that part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.[9]

7. As to the author's other allegations, the Committee declares them admissible and proceeds, without further delay, to the examination of the substance of the claims, in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.1 The Committee has noted counsel's argument that the six years Mr. Chaplin spent on death row amounted to inhuman and degrading treatment within the meaning of article 7 of the Covenant. The Committee is fully aware of the ratio decidendi of the judgement of the Judicial Committee of the Privy Council of 2 November 1993 in the case of Pratt and Morgan, which has been adduced by counsel, and has taken note of the State party's reply in this respect. In the absence of special circumstances, such as procedural delays imputable to the State party, the Committee reaffirms its jurisprudence that prolonged judicial proceedings do not per se constitute cruel, inhuman and degrading treatment and that, in capital cases, even prolonged periods of detention on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment.[10] In the instant case, the Committee does not consider that the length of the author's detention on death row constituted a violation of article 7.

8.2 With regard to the author's allegation that he was subjected to ill-treatment on 6 September 1992 by prison warders, the Committee notes that the author has made very precise allegations, including to the parliamentary ombudsman and to the Jamaica Council for Human Rights. The State party has not submitted any medical evidence or information concerning any official investigation of the alleged events. In these circumstances, the Committee must rely on the author's submissions and finds that article 10, paragraph 1, of the Covenant, has been violated.

8.3 As to the author's representation on appeal, in particular the fact that counsel assigned to him for this purpose was not of his own choosing, the Committee recalls that, while article 14, paragraph 3 (d), of the Covenant does not entitle the accused to choose counsel provided to him free of charge, the Court must ensure that counsel, once assigned, provides effective representation in the interests of justice. The written judgement of the Court of Appeal shows that author's counsel argued the appeal, even if he did not advance all the grounds that the author would have wanted argued. In the circumstances, the Committee finds that the author's right under article 14, paragraph 3 (d), was not violated.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights,

is of the view that the facts before it disclose a violation of article 10, paragraph 1, of the Covenant.

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy, including compensation.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] Peter Grant and Howard Malcolm also submitted their cases to the Human Rights Committee; their cases were registered as communications No. 597/1994 (see section Z below) and No. 595/1994, respectively. Following the commutation of his sentence, Howard Malcolm withdrew his case, which was accordingly discontinued by the Committee in July 1995.

[b] Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40 (A/49/40), vol. II, annex IX.V, communication No. 445/1991 (Champagnie, Palmer and Chisholm v. Jamaica), views adopted on 18 July 1994.

[c] Privy Council Appeal No. 10 of 1993; judgement delivered on 2 November 1993.

[d] The author made a complaint to the parliamentary ombudsman on 22 September 1992, and as a consequence the warder was dismissed from his job.

[e] See Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40), annex X.F, communications Nos. 210/1986 and 225/1987, views adopted on 6 April 1989, para. 13.6.

[f] Ibid., Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.J, para. 8.3.

[g] See the Committee's decision adopted on 3 April 1995, in communication No. 541/1993 (Simms v. Jamaica), in Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40), vol. II, annex XI.H, para. 6.5.

[h] Ibid., Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.F, communications Nos. 270/1988 and 271/1988 (Barrett and Sutcliffe v. Jamaica), views adopted on 30 March 1992, para. 8.4; see also section A above, paras. 9.3 and 9.4.

Appendix

[Original: English]

Individual opinion of Committee members Nisuke Ando and Eckart Klein

We concur with the Committee's views on the present case. However, with respect to the violation of article 10, paragraph 1, of the Covenant, we would like to point out the following:

It is a well-established rule of general public international law that individuals who claim to be victims of a violation of their rights by a State may resort to international remedies only after having exhausted all available domestic remedies. This is also expressly required by article 5, paragraph 2 (b), of the Optional Protocol to the Covenant. However, it is also well established tnat the State bears no international responsibility if the domestic remedies granted to the victims have led to an adequate reparation, thus satisfying the requirements of public international law.

In the present case, on the basis of the information made available to the Committee, it seems clear that beatings of the author by a prison warder did take place and that, through the author's complaint to the parliamentary ombudsman, the warder was dismissed from his job. However, in the absence of further information, for which the State party must be held responsible, we have to conclude that the dismissal of the warder through the complaint to the ombudsman was the only remedy granted to the author. In our opinion, that procedure does not constitute an effective remedy that meets the requirements of the Covenant.

(Signed) Nisuke Ando

Eckart Klein

Z. Communication No. 597/1994, Peter Grant v. Jamaica (views adopted on 22 March 1996, fifty-sixth session)*

Submitted by: Peter Grant [represented by counsel]

Victim: The author

State party: Jamaica

Date of communication: 12 August 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 March 1996,

Having concluded its consideration of communication No. 597/1994, submitted to the Human Rights Committee by Mr. Peter Grant under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Peter Grant, a Jamaican citizen, currently detained at the South Camp Rehabilitation Centre, a prison in Kingston. At the time of submission he was awaiting execution at St. Catherine District Prison. On 14 July 1995 his sentence was commuted to life imprisonment. He claims to be a victim of violations by Jamaica of articles 6, paragraph 2; 7; 9; 10, paragraph 1; and 14, paragraphs 1 and 3 (g), of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author was convicted together with his co-defendants, Dennie Chaplin and Howard Malcolm,* of the murder of Vincent Myrie and sentenced to death on 15 December 1988, by the St. James Circuit Court, Montego Bay, Jamaica. Their appeal was dismissed by the Court of Appeal of Jamaica on 16 July 1990. The author's petition for special leave to appeal to the Judicial Committee of the Privy Council was similarly dismissed, on 22 November 1993.

2.2 It is contended by counsel that constitutional remedies are not, in practice, available to the author, who lacks financial means. Counsel submits, therefore, that all domestic remedies have been exhausted for purposes of the Optional Protocol and refers to the Committee's jurisprudence in similar cases.

* Pursuant to rule 85 of the rules of procedure, Committee member Laurel Francis did not take part in the adoption of the views.

2.3 The case for the prosecution was that, on 18 June 1987, at 11:00 a.m., Mr. Myrie was stabbed in the back and bludgeoned with an iron bar, and that petrol was poured over him and then set alight. The prosecution's case was based on statements made to the police by the three accused as well as on circumstantial evidence.

2.4 During the trial, the author's uncle testified that, on 18 June 1987, the author and Dennie Chaplin had come to his home at about 7:00 a.m. to borrow a Red Morris Marina pick-up truck. Grant's uncle was unable to lend the pick-up as he had promised it to Mr. Myrie. Mr. Chaplin and the author left, saying that they would arrange to borrow the car directly from Mr. Myrie. Another witness (S.W.) testified that at 8:00 a.m. she was given a lift by Mr. Myrie from Johnson Town to Hopewell and that there were three other men in the truck; one she identified as Howard Malcolm. She also testified to seeing an iron bar protruding from the box in the back of the pick-up. A third witness (S.C.) testified that at 11:00 a.m., while walking along the Lithe road, she saw first a burning plastic jug on the side of the road and then noticed a red pick-up truck which passed her twice going in different directions. Finally a petrol station attendant saw the pick-up at 1:00 p.m. at the petrol station in Ramble.

2.5 Chaplin's aunt testified that Chaplin and the author had come to her place, on 19 June 1987. Chaplin told her that he was: "Mix up in a little trouble", and asked to leave the pick-up at her premises; she agreed, and the author also left her the car keys and licence plates.

2.6 On 13 July 1987, the author was arrested and detained at Sandy Bay Lock-up. He was seen by the investigating officer on 20 July 1987, when he also gave a written statement under caution. No magistrate or other judicial officer was present. In the statement, the author admitted participating in the murder and implicated Dennie Chaplin and Howard Malcolm. Later, at the trial, the author affirmed that the statement had not been voluntary but rather that he had been subjected to death threats and other ill-treatment.

2.7 The author's co-accused, Dennie Chaplin and Howard Malcolm, had been arrested on 3 July and 2 July 1987, respectively, and had given statements to the police admitting their presence at the scene of the murder and implicating the author.

2.8 Although identification parades were held, the author was not identified. He was, however, identified during the trial by his uncle, Chaplin's aunt and the petrol station attendant.

2.9 The statement given by the author was the object of a trial within the trial. After hearing the author, the judge also heard the police officers, who denied that the statement had been given under duress. The judge admitted the statement into evidence, despite counsel's objection.

2.10 At the trial, each of the three defendants gave a statement from the dock denying his own participation but implicating the other two.

2.11 It is stated that the case has not been submitted to another procedure of international investigation or settlement.

The complaint

3.1 The author claims that the ill-treatment he was submitted to by the investigating officer, in order to induce him to sign a confession of guilt, constitutes a violation of articles 7, 10, paragraph 1, and 14, paragraph 3 (g), of the Covenant.

3.2 Counsel alleges that no evidence was given to justify the delay of seven days between the author's detention and his being seen by the investigating officer; counsel contends that that period of detention was meant to induce the author to sign a statement. Counsel also alleges that the author was only informed of the charges against him after seven days, during the meeting with the investigating officer, and that he was not brought promptly before a judge. The above is said to constitute a violation of article 9, paragraphs 2, 3, and 4, of the Covenant. In this context, counsel refers to the Committee's jurisprudence[3] in which violations of article 9, paragraph 3, were found because the delays exceeded a few days.

3.3 Counsel claims that the trial judge erred in admitting the author's statement to the police into evidence and, moreover, misdirected the jury by failing to direct them to take the author's illegal detention into account and by telling them that: "... I cannot see the significance of whether he went the day before or whether it took him a week to get Grant". It is further argued that the judge misdirected the jury by informing them that he had admitted the statement into evidence. In this connection, counsel submits that once a statement has been admitted into evidence it is still for the jury to decide if they are satisfied that it was properly obtained. Counsel claims that any comment from the learned judge regarding the admissibility of the statement carried the risk of influencing the jury. It is submitted that the correct practice would have been for the judge to say nothing about having admitted the statement in evidence, but simply to tell the jury that they were to consider the statement themselves and decide if it could be relied upon. Moreover, it is argued that the trial judge, having properly directed the jury in that a statement under caution of one defendant is not evidence against the other defendants, was then incorrect to compare and contrast the statements of the three defendants, effectively saying that all the defendants excused themselves and blamed the other two. Counsel claims that the judge's directions clearly constitute a denial of justice, in violation of article 14, paragraph 1, of the Covenant.

3.4 Finally, counsel points out that the author was held on death row for six years awaiting execution; the "agony and suspense" derived from such a long period on death row is submitted to be cruel, inhuman and degrading treatment. Reference is made to the decision of the Judicial Committee of the Privy Council in the case of Pratt and Morgan v. Attorney-General of Jamaica,[4] in which it was held, inter alia, that the delay in carrying out the execution constitutes cruel, inhuman and degrading treatment. It is also submitted that the delay in this case is on its own sufficient to constitute a violation of articles 7 and 10, paragraph 1. It is further submitted that the conditions at St. Catherine District Prison amount to a violation of the author's rights under articles 7 and 10, paragraph 1. In this context, the author mentions being confined to a cell for 22 hours a day, isolated from other men, with nothing to do, much of the time in enforced darkness.

The State party's observations

4.1 In its submission of 10 February 1995, the State party does not raise objections to the admissibility of the communication and addresses the merits, in order to expedite the disposition of the case.

4.2 As regards the allegation of breach of article 9, paragraph 2, of the Covenant, the State party argues that while it is a well-known principle of criminal law that an arrested person must be informed of the grounds for his arrest, there are cases in which it is obvious that the person in question was well aware of the substance of the alleged offence (R. v. Howarth [1928], Mood CC 207). The facts of the instant case reveal that Mr. Grant knew of the substance of the alleged offence for which he had been arrested.

4.3 In respect of the allegation of breach of article 9, paragraph 3, of the Covenant, the State party notes that the principle is that an arrested person should be brought before a magistrate within a reasonable time. Any determination as to what amounts to a reasonable time depends on the circumstances of the case. In any event, there was no delay in bringing Mr. Grant before the courts for trial.

4.4 As regards the allegation of breach of article 9, paragraph 4, the State party denies that there has been any breach of that provision. Article 9, paragraph 4, provides that an arrested person is entitled to take proceedings before a court to determine the lawfulness of his detention and to order his release if the detention is not lawful. Mr. Grant had the opportunity to have filed on his behalf a writ of habeas corpus to secure his release. There has been no denial of his right to do so by the State but rather a failure on the part of Mr. Grant to exercise the right to apply for the writ.

4.5 The State party denies the allegations of breaches of articles 7, 10, paragraph 1, and 14, paragraph 3 (g), in connection with the procurement of the author's statement. The State party contends that the decision of the St. James Circuit Court on the admissibility of the confession finally determines the issue vis-à-vis the Committee, since it is an issue of fact and evidence upon which the Committee has emphasized that it is not competent to adjudicate.

4.6 With regard to the allegation of a breach of articles 7 and 10, paragraph 1, because Mr. Grant was on death row for more than five years, the State party submits that the judgement of the Privy Council in Pratt and Morgan v. Attorney-General should not be considered a prejudgement of every case in which there is a prisoner on death row for more than five years. Each case must be looked at on its merits before a determination can be made as to whether such a case falls within the principles set out by the Privy Council in Pratt and Morgan v. Attorney-General.

4.7 This contention is supported by the Committee's own jurisprudence. In fact, in the Committee's decision in the Pratt and Morgan v. Jamaica case, the view was adopted that the delay by itself would not necessarily constitute a breach of article 7.[e]

Counsel's comments

5.1 In his submission of 7 March 1995, counsel agrees to the examination of the merits at this stage.

5.2 With regard to article 9 of the Covenant, counsel contests the State party's argument that as Mr. Grant knew of the substance of the alleged offence for which he had been arrested, there was no need to inform him of the grounds for his arrest and that it was reasonable for Mr. Grant to be brought before a judicial officer seven days after his detention. Article 9 was the subject of general comment No. 8 (16) by the Human Rights Committee. The Committee noted that delays under article 9, paragraph 3, must not exceed a few days and that pretrial detention "should be an exception and as short as possible".[4] It is submitted that no compelling evidence was called to explain the delay of seven days between the time Mr. Grant was detained and the investigating officer saw him.

5.3 A requirement to give reasons on arrest was imposed at common law (Christie v. Leachinsky [1947] AC 573, HL) and is now found in s.28 of the Police and Criminal Evidence Act, 1984. Thus, a person arrested must be informed of both the fact and the grounds of arrest or as soon as practicable thereafter; where a person is arrested by a constable, those obligations apply regardless of whether the matters are obvious. Where no reason is given, the arrest is clearly unlawful.

5.4 Article 9, paragraph 3, of the Covenant requires that a person detained on a criminal charge be brought promptly before a judicial officer. In Kelly v. Jamaica (communication No. 253/1987), the Committee emphasized that delays should not exceed a few days.

5.5 Article 9, paragraph 4, of the Covenant entitles any person subject to arrest or detention to challenge the lawfulness of detention before a Court without delay. The State party contends that there was no denial by the State of Mr. Grant's right to do so, but rather a failure on the part of Mr. Grant himself to exercise the right to apply for a writ of habeas corpus. It is submitted that as Mr. Grant was not brought promptly before a judicial officer within the meaning of article 9, paragraph 3, he was not able to take proceedings before a court to determine the lawfulness of his detention.

5.6 With regard to articles 7, 10, paragraph 1, and 14, paragraph 3 (g), counsel submits that the treatment of Mr. Grant by the investigating authorities did amount to direct physical and psychological pressure, which he attempted to substantiate to the best of his ability at his trial. The attorney who represented Mr. Grant at his trial stated that he had complained to him of being beaten to sign a confession. Despite the testimony of Mr. Grant and the submissions made on his behalf by counsel, Mr. Justice Wolfe ruled that the statement would be admitted in evidence. Despite the decision of the trial judge, it is submitted that the confession was procured by methods amounting to torture.

5.7 As to the "death row phenomenon", author's counsel refers to the judgement of the Judicial Committee of the Privy Council in Pratt and Morgan v. Attorney-General of Jamaica, holding that "in any case in which execution is to take

place more than five years after sentence, there will be strong grounds for believing that the delay is such as to constitute inhuman and degrading punishment". The Judicial Committee further held that a State "must accept the responsibility for ensuring that execution follows as swiftly as practical after sentence, allowing a reasonable time for appeal and consideration of reprieve".

5.8 Counsel further refers to the Committee's general comment on article 7 that when the death penalty is applied by the State party for the most serious crimes it must be carried out in such a way as to cause the least possible physical pain and suffering. Counsel submits that any execution that would take place more than five years after conviction entails a violation of article 7.

Decision on admissibility and examination of the merits

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes that the State party does not raise objections to the admissibility of the communication and has submitted its observations on the merits in order to expedite the procedure. The Committee further notes that counsel for the author agrees to the examination of the merits of the communication at this stage.

6.4 While prepared to declare the communication admissible, the Committee has nonetheless examined whether all of the author's allegations satisfy the admissibility criteria of the Optional Protocol.

6.5 With regard to the author's allegations that he was tortured in order to induce him to confess, the Committee notes that that was the subject of a trial within the trial to determine whether the author's statement was admissible evidence. In this connection, the Committee refers to its prior jurisprudence and reiterates that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case; it notes that the Jamaican courts examined the author's allegations and found that the statement had not been procured under duress. In the absence of a clear showing of bias or misconduct by the judge, the Committee cannot re-evaluate the facts and evidence underlying the judge's finding. Accordingly, that part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.6 With regard to the judge's instructions to the jury, the Committee reaffirms its jurisprudence that it is not within its competence to review specific instructions to the jury by a trial judge unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The material before the Committee, including the written judgement of the Court of Appeal, does not show that the trial judge's instructions or the conduct of the trial suffered from such defects. Accordingly, that part of the

communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.7 As to the author's allegations that prolonged detention on death row amounts to a violation of article 7 of the Covenant, the Committee refers to its jurisprudence that the length of detention alone does not entail a violation of article 7 in the absence of some further compelling circumstances particular to the individual concerned.[9] In the instant case, the Committee observes that the author has not substantiated any specific circumstances that would raise an issue under article 7 of the Covenant. That part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7. As to the author's other allegations, the Committee declares them admissible and proceeds, without further delay, to the examination of the substance of the claims, in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.1 With regard to the author's allegations concerning a violation of article 9, the Committee observes that the State party is not absolved from its obligation under article 9, paragraph 2, of the Covenant to inform a person of the reasons for his arrest and of the charges against him, because of the arresting officer's opinion that the arrested person is aware of them. In the instant case, the author was arrested some weeks after the murder with which he was subsequently charged, and the State party has not contested that he was not informed of the reasons for his arrest until seven days later. In the circumstances, the Committee concludes that there has been a violation of article 9, paragraph 2.

8.2 As regards the author's claim under article 9, paragraph 3, the Committee notes that it is not clear from the information before it when the author was first brought before a judge or other officer authorized by law to exercise judicial power. It is uncontested, however, that the author, when he was seen by the investigating officer seven days after his arrest, had not yet been brought before a judge, nor was he brought before a judge that day. Accordingly, the Committee concludes that the period between the author's arrest and his being brought before a judge was too long and constitutes a violation of article 9, paragraph 3, of the Covenant and, to the extent that this prevented the author from access to court to have the lawfulness of his detention determined, of article 9, paragraph 4.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 9, paragraphs 2, 3 and 4, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Grant with an effective remedy. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine

whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken in connection with the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] Dennie Chaplin and Howard Malcolm also submitted their cases to the Human Rights Committee; their cases were registered as communications No. 596/1994 (see section Y above) and No. 595/1994, respectively. Following the commutation of his sentence, Howard Malcolm withdrew his case, which was accordingly discontinued by the Committee in July 1995.

[b] See Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40 (A/49/40), vol. II, annex IX.V, communication No. 445/1991 (Champagnie, Palmer and Chisholm v. Jamaica), views adopted on 18 July 1994.

[c] Ibid., Forty-sixth Session, Supplement No. 40 (A/46/40), annex XI.D, communication No. 253/1987 (Kelly v. Jamaica), views adopted on 8 April 1991; and ibid., Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.I, communication No. 277/1988 (Terán Jijón v. Ecuador), views adopted on 26 March 1992.

[d] Privy Council Appeal No. 10 of 1993; judgement delivered on 2 November 1993.

[e] Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40), annex X.F, communications Nos. 210/1986 and 225/1987, views adopted on 6 April 1989, para. 6.3.

[f] Ibid., Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, general comment No. 8 (16), para. 3.

[g] See section W of the present annex. See also Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40), annex X.F, communications Nos. 210/1986 and 225/1987 (Pratt and Morgan v. Jamaica), views adopted on 6 April 1989.

AA. Communication No. 598/1994, Carl Sterling v. Jamaica
(views adopted on 22 July 1996, fifty-seventh session)

Submitted by: Carl Sterling [represented by counsel]

Victim: The author

State party: Jamaica

Date of communication: 18 October 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 July 1996,

Having concluded its consideration of communication No. 598/1994, submitted to the Human Rights Committee by Mr. Carl Sterling under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Carl Sterling, a Jamaican citizen who, at the time of submission of his complaint, was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 2, paragraph 3; 6; 7; 10; and 14, paragraphs 3 (b), and (d), of the International Covenant on Civil and Political Rights, and article 2 of the Optional Protocol. He is represented by counsel. The author's death sentence has been commuted.

The facts as submitted by the author

2.1 On 28 September 1989, the author was convicted of the murder of Bertram Kelly and sentenced to death in the St. James Circuit Court, Montego Bay, Jamaica. His appeal was dismissed by the Court of Appeal of Jamaica on 7 December 1990. On 5 May 1992, the author's petition for special leave to appeal to the Judicial Committee of the Privy Council was also dismissed.

2.2 On 4 May 1993, the author was the victim of beatings at the hand of prison warders and police officers while a search was carried out in his cell. As a result of the beatings, the author was in severe pain, which included passing blood into his urine. He informed the acting superintendent that he wished to see a doctor. The swelling of his testicles was such that he was unable to sleep during the night of 4 May 1993. He was finally taken to hospital, where medication was prescribed. However, the author did not receive any medication from the prison authorities; he purchased painkilling tablets himself.

2.3 The author informed the prison authorities that he had been beaten and was told to write to the parliamentary ombudsman. He did not do so for fear of reprisals. On 8 December 1993, author's counsel wrote to the parliamentary ombudsman, informing him of the author's beating and requesting that the matter be investigated. A reminder was sent on 17 August 1994, but no reply has been received.

2.4 From correspondence between the author and counsel representing him before the Committee, it appears that the author was unaware that a petition for special leave to appeal to the Privy Council had been lodged on his behalf by a law firm in London other than that of his current legal representatives.

2.5 Author's counsel has requested, on eight different occasions, that the State party supply her with the trial transcript and the judgement of the Court of Appeal in the case. Additional requests addressed to the same instances were made by the author and by the Jamaica Council for Human Rights.

2.6 Counsel contends that, in practice, constitutional remedies are not available to the author because he is indigent and Jamaica does not make legal aid available for the purpose of constitutional motions. Reference is made to the Human Rights Committee's jurisprudence.[a] Accordingly, all domestic remedies are said to have been exhausted for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

The complaint

3.1 The author claims that he is a victim of a violation of articles 7 and 10 of the Covenant, in view of the length of his detention on death row. The author has been held at St. Catherine District Prison since his conviction on 28 September 1989 and has been on death row for over five years. Counsel alleges that the execution of the author after the period of time he spent on death row would render his execution cruel, inhuman and degrading treatment. Reference is made to the judgement of the Judicial Committee of the Privy Council in the case of Pratt and Morgan v. Attorney-General of Jamaica.[b]

3.2 Counsel submits that the conditions at St. Catherine District Prison amount to a violation of the author's rights under articles 7 and 10, paragraph 1. In respect of this claim, the author reports an incident which took place on 3 and 4 May 1993, when, during a prison search, he was severely beaten by prison warders, as described in paragraphs 2.2 and 2.3 above.

3.3 Counsel further submits that the author is a victim of a violation of article 14, paragraphs 3 (b) and (d), as the author was not even aware that a petition for special leave to appeal had been filed on his behalf; he was therefore not represented by a lawyer of his choice and was unable to communicate with his lawyer and hence unable to prepare his defence. Reference is made to the Committee's jurisprudence in this respect.[c]

3.4 Counsel further submits that the author is a victim of a violation of article 2, paragraph 3, of the Covenant, in connection with article 2 of the Optional Protocol, because Jamaica failed to provide a trial transcript despite the numerous requests made by the author and his counsel. Counsel contends that Jamaica effectively deprived Mr. Sterling of the possibility of submitting a communication to the Human Rights Committee, in accordance with article 2 of the Optional Protocol, as without access to the trial transcript it is virtually impossible for the author's legal representatives to ascertain whether the criminal proceedings concerning the author were carried out in accordance with article 14 and other provisions of the Covenant.

3.5 Counsel further submits that the imposition of a sentence of death upon the conclusion of a trial in which a provision of the Covenant has been breached, if no further appeal against the sentence is available, constitutes a violation of article 6, paragraph 2.

The State party's information and observations on admissibility and the author's comments thereon

4.1 In a submission dated 14 February 1995, the State party does not object to the admissibility of the complaint and offers observations on the merits of the case.

4.2 With respect to the allegation that the author was ill-treated while on death row, at St. Catherine District Prison, on 4 May 1993, the State party notes that it will investigate the matter and inform the Committee as soon as the results of the investigation are available. No further information had been received on the findings of the State party's investigation by 20 June 1996, in spite of a reminder sent on 24 April 1996.

4.3 On the "death row phenomenon" claim, the State party contends that the Privy Council's decision in Pratt and Morgan is no authority for the proposition that incarceration on death row for a specific period of time constitutes cruel and inhuman treatment. Each case must be examined on its own facts, in accordance with applicable legal principles. The State party refers to the Committee's own views in Pratt and Morgan, in which it was held that delays in judicial proceedings did not per se constitute cruel, inhuman or degrading treatment.

4.4 Concerning the alleged breach of article 14, paragraph 3, the State party contends that the fact that the author was not aware that another attorney had petitioned the Judicial Committee of the Privy Council on his behalf cannot be attributed to the State party, since the Government of Jamaica has in no way interfered, by action or omission, with the author's access to counsel of his own choice. The State party contends that the matter is one of attorney/client relationship in which the Government has no reason to intervene.

4.5 Concerning the claim that the trial transcript and the appeal judgement were not transmitted to the author, in breach of article 2, paragraph 3, of the Covenant, in connection with article 2 of the Optional Protocol, the State party notes that an investigation into the matter has been ordered. On 13 June 1996, the State party informed the Committee that the author's counsel had received the transcripts, without giving a specific date.

5.1 In her comments, dated 16 March 1995, counsel reaffirms that her client is a victim of violations of article 14, paragraphs 3 (b) and (d), not because the State party can be held responsible for the client/attorney relationship but because the Jamaican courts proceeded with the examination of the author's petition even though, as should have been apparent to the court, the author was not aware that someone had been instructed to represent him. It is in this respect that the requisite "minimum guarantees" to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing, or to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing, were not respected. Counsel states that although situated in London, the Judicial Committee of the Privy Council is a Commonwealth Court and for that reason the relevant Commonwealth State should be held responsible for any irregularities in the conduct of the proceedings before the Judicial Committee of the Privy Council.

5.2 Counsel notes that the State party does not deny the ill-treatment the author was subjected to on 4 May 1993 at St. Catherine District Prison, and reiterates her initial allegations.

5.3 With respect to the non-transmittal of the trial transcript, counsel acknowledges receipt of a copy of the requested documents.

Consideration of admissibility and examination of merits

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee observes that with the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council on 5 May 1992, the author exhausted domestic remedies for purposes of the Optional Protocol. In this context, it notes that the State party has not raised objections to the admissibility of the complaint and has forwarded comments on the merits so as to expedite the procedure. The Committee recalls that article 4, paragraph 2, of the Optional Protocol stipulates that the receiving State shall submit its written observations on the merits of a communication within six months of the transmittal of the communication to it for comments on the merits. The Committee reiterates that that period may be shortened, in the interest of justice, if the State party so wishes.[4] The Committee further notes that counsel for the author has agreed to the examination of the case on the merits at this stage.

6.3 The author has alleged a violation of article 14, paragraphs 3 (b) and (d), in that he was not represented by counsel of his own choosing and was unable to consult with him, because he was unaware that he was in fact already represented before the Judicial Committee of the Privy Council in London by a firm other than his current legal representatives. The Committee considers that neither the author nor his counsel before the Committee have sufficiently substantiated, for purposes of admissibility, how his representation before the Privy Council entailed a violation of his Covenant rights. The Committee therefore finds that that part of the communication is inadmissible.

7. The Committee accordingly decides that the case is admissible and proceeds, without further delay, to an examination of the substance of the author's claims in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.1 The Committee must determine whether the length of time the author spent on death row - six years and nine months - amounts to a violation of articles 7 and 10, paragraph 1, of the Covenant. Counsel has claimed a violation of those provisions merely by reference to the length of time Mr. Sterling was confined to death row. It remains the Committee's jurisprudence that detention on death row for a specific time does not violate articles 7 and 10, paragraph 1, of the Covenant in the absence of further compelling circumstances. The Committee refers in this context to its views on communication No. 588/1994 (see section W above) in which it explained and clarified its jurisprudence on the issue of the death row phenomenon. In the Committee's opinion, neither the author nor his counsel have shown the existence of further compelling circumstances beyond the length of detention on death row. While a period of detention on death row of six years and nine months is a matter of concern, the Committee concludes that that delay does not per se constitute a violation of articles 7 and 10, paragraph 1.

8.2 With regard to the author's alleged ill-treatment and lack of medical attention at St. Catherine District Prison, the Committee notes that the author has made very precise allegations, which he documented in complaints to the

prison authorities and to the parliamentary ombudsman of Jamaica. The State party has promised to investigate those claims, but has failed to forward to the Committee its findings a year and four months after promising to do so, in spite of a reminder sent on 22 April 1996. In the circumstances, the Committee finds the author's submissions on the treatment he was subjected to on death row credible and concludes that articles 7 and 10, paragraph 1, of the Covenant have been violated.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7 and 10, paragraph 1, of the Covenant.

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy for the violations suffered. The Committee considers that that should entail adequate compensation for the ill-treatment and lack of medical attention he suffered. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] See, for example, Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40 (A/49/40), vol. II, annex IX.V, communication No. 445/1991 (Champagnie, Palmer and Chisholm v. Jamaica), views adopted on 18 July 1994.

[b] Privy Council Appeal No. 10 of 1993; judgement delivered on 2 November 1993.

[c] Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex VIII, communication No. 63/1979 (Sendic v. Uruguay), views adopted on 28 October 1981; and ibid., Thirty-eighth Session, Supplement No. 40 (A/38/40), annex X, communication No. 16/1977 (Mbenge v. Zaire), views adopted on 25 March 1983.

[d] See views adopted on 25 July 1995 on communication No. 606/1994 (Francis v. Jamaica), in Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40), vol. II, annex X.N, para. 7.4.

BB. Communication No. 599/1994, Wayne Spence v. Jamaica (views adopted on 18 July 1996, fifty-seventh session)*

Submitted by: Wayne Spence [represented by counsel]

Victim: The author

State party: Jamaica

Date of communication: 20 October 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 1996,

Having concluded its consideration of communication No. 599/1994, submitted to the Human Rights Committee on behalf of Mr. Wayne Spence under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Wayne Spence, a Jamaican citizen who, at the time of submission of his communication, was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 7 and 10, paragraph 1, of the International Covenant on Civil and Political Rights. Mr. Spence is represented by counsel. In the spring of 1995, the author's death sentence was commuted to life imprisonment.

The facts as presented by the author

2.1 The author was convicted of two murders and sentenced to death on 13 October 1988 in the Home Circuit Court in Kingston. His appeal against conviction and sentence was dismissed by the Court of Appeal of Jamaica on 18 June 1990. A subsequent petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 29 October 1992.

2.2 Counsel argues that constitutional remedies are unavailable in practice to Mr. Spence, as he is indigent and the State party does not make available legal aid for the purpose of constitutional motions; reference is made in this context to the Committee's jurisprudence. Counsel accordingly submits that all domestic remedies have been exhausted for the purpose of the Optional Protocol.

The complaint

3.1 The author submits that he is a victim of a violation of articles 7 and 10, paragraph 1, of the Covenant because of the length of time he spent on death row. From his conviction in October 1988 to the spring of 1995, i.e. for six and a half years, he was detained in the death row section of St. Catherine District Prison. Counsel contends that the execution of the sentence after such

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* Pursuant to rule 85 of the rules of procedure, Committee member Laurel Francis did not take part in the adoption of the views. The text of an individual opinion by one Committee member is appended.

a delay would constitute cruel, inhuman and degrading treatment, in violation of article 7. Reference is made to the judgement of the Judicial Committee of the Privy Council in Pratt and Morgan v. Attorney-General of Jamaica, in which it was held, inter alia, that a delay of over five years in carrying out the execution of a capital sentence lawfully imposed constitutes inhuman and degrading treatment. To counsel, the delay is in itself sufficient to find a violation of articles 7 and 10, paragraph 1.

3.2 It is further submitted that the conditions of detention at St. Catherine District Prison amount to a violation of the author's rights under articles 7 and 10, paragraph 1. Those conditions have been examined and criticized by non-governmental organizations and are well documented. In this respect, reference is made to an incident which occurred on 3 and 4 May 1993, during which the author claims he was severely beaten by prison warders and a soldier. After the beatings, which allegedly included being hit with batons, an iron pipe and a metal detector, the author was refused the medical treatment he had requested. His report of the incident is included in a deposition made and signed in the presence of a witness on 14 May 1993.

3.3 Counsel notes that after the events of 3 and 4 May 1993, the author did not himself contact the Office of the Parliamentary Ombudsman for fear of reprisals. On 3 December 1993, the author's legal representative contacted the ombudsman and requested a thorough and speedy investigation of the complaint. The ombudsman's reply, dated 10 February 1994, indicated that his office had been unable to identify any participants in the events of 4 May 1993 and that, accordingly, he was unable to take the matter any further. Counsel contends that such a superficial investigation cannot be deemed to amount to an effective domestic remedy.

The State party's observations on the admissibility and merits of the case and counsel's comments thereon

4.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 24 February 1995, the State party does not raise objections to the admissibility of the communication and, so as to expedite matters, offers comments on the merits of the case.

4.2 The State party denies that there has been a breach of articles 7 and 10, paragraph 1, of the Covenant because the author was confined to death row for over six years. It contends that the judgement of the Judicial Committee of the Privy Council in Pratt and Morgan is no authority for the proposition that once a person has been on death row for a specific period of time, his continued detention there automatically constitutes cruel and inhuman treatment contrary to the Jamaican Constitution. Rather, it argues, each case must be examined on its merits in accordance with the applicable legal principles. In support of its contention, the State party invokes the Committee's views on the case of Pratt and Morgan, in which it was held that "prolonged judicial proceedings do not per se constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for convicted prisoners. However, ... an assessment of the circumstances of each case would be necessary".[4]

4.3 As to the author's claim of ill-treatment by warders and police officers on 4 May 1993, the State party notes that those "allegations will be investigated and the Committee will be informed of the results".[5]

5. By letter of 3 April 1995, counsel notes that she has nothing to add to her review of the legal principles applicable to the so-called "death row

phenomenon" in the initial communication. She suggests that the Committee examine the claim of Mr. Spence's ill-treatment on death row on its merits if the State party does not report on the findings of its investigations within two months.

Decision on admissibility and examination of the merits

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party does not raise any objections to the admissibility of the communication and has forwarded its observations on the merits, in order to expedite the procedure. It recalls that article 4, paragraph 2, of the Optional Protocol stipulates that the State party shall submit its written comments on the merits of a case within six months of the transmittal of the complaint to it for comments on the merits. As the Committee stated in earlier cases, that period may be shortened, in the interest of justice, if the State party so wishes. Furthermore, counsel for the author has agreed to the examination of the merits at this stage, without offering additional comments.

6.3 Having concluded that the communication meets all admissibility requirements under the Optional Protocol, the Committee accordingly decides that the communication is admissible and proceeds, without further delay, to the examination of the substance of the author's claims, in the light of all the information made available by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.1 The first issue to be determined is whether the period of time the author spent on death row, i.e. approximately six and a half years, amounts to a violation of articles 7 and 10, paragraph 1, of the Covenant. The Committee refers to its established jurisprudence that prolonged detention on death row does not per se amount to cruel, inhuman and degrading treatment in the absence of further compelling circumstances. That there are no "further compelling circumstances" in the instant case has been confirmed by counsel herself, who has argued that the delay (i.e., Mr. Spence's confinement to death row for over six years) should be deemed in itself sufficient to constitute a violation of articles 7 and 10, paragraph 1. Accordingly, the Committee finds no violation of those provisions on this count. Similar conclusions apply to the allegation that the author's conditions of detention violated articles 7 and 10, paragraph 1, as counsel has not substantiated that claim other than by submitting documents of a general nature.

7.2 The author has further alleged a violation of articles 7 and 10, paragraph 1, because of the ill-treatment he was subjected to on 4 May 1993, in the course of police and armed forces intervention during a prison riot. The State party promised to investigate that claim, but failed to forward to the Committee its findings on the matter. The Committee notes that the author's allegations, which are contained in a signed and witnessed deposition dated 14 May 1993, are precise in that he identifies the warders who ill-treated him, furnishes a description of a soldier who also beat him and describes the weapons with which he was beaten. His additional claim that he was refused the medical treatment he was entitled to and which the State party should have provided him with after sustaining injuries in the incident has not been refuted. The Committee further observes that in spite of the author's deposition, the Office

of the Parliamentary Ombudsman claims to have been unable to identify anyone said to have been involved in the incident. In the circumstances of the case, and in the absence of State party explanations on this issue, the Committee concludes that there has been a violation of articles 7 and 10, paragraph 1.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation of articles 7 and 10, paragraph 1, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy for the violations suffered. The Committee considers that that should include the award of appropriate compensation for the ill-treatment suffered on 4 May 1993. Furthermore, the State party is under an obligation to investigate thoroughly and promptly events of the nature of those of 4 May 1993 and to ensure that similar violations do not recur.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40), annex X.F, communications Nos. 210/1986 and 225/1987 (Pratt and Morgan v. Jamaica), views adopted on 6 April 1989, para. 13.6.

[b] As of 3 July 1996, the State party had not forwarded the results of those investigations to the Committee in spite of a reminder addressed to it on 29 April 1996.

[c] See, for example, Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40), vol. II, annex X.N, communication No. 606/1994 (Francis v. Jamaica), views adopted on 25 July 1995, para. 7.4.

Appendix

[Original: Spanish]

Individual opinion of Committee member Francisco José Aguilar Urbina

The terms in which the majority opinion on the communication submitted by Wayne Spence against Jamaica was expressed obliges me to express my individual opinion. The majority opinion again maintains the earlier jurisprudence that the time factor does not per se constitute a violation of article 7 of the International Covenant on Civil and Political Rights as far as the death row phenomenon is concerned. The Committee has repeatedly maintained that the mere fact of being sentenced to death does not constitute cruel, inhuman or degrading treatment or punishment. In my opinion, the Committee is wrong to seek inflexibly to maintain its jurisprudence without clarifying, analysing and appraising the facts before it on a case-by-case basis. In the communication concerned, the Human Rights Committee's wish to be consistent with its previous jurisprudence has led it to rule that the length of detention on death row is not in any case contrary to article 7 of the Covenant.

The majority opinion seems to be based on the supposition that only a total reversal of the Committee's jurisprudence would allow it to decide that an excessively long stay on death row could entail a violation of that provision. In this respect, I must refer to my opinion and analysis regarding communication No. 588/1994 (Errol Johnson v. Jamaica) [section W, appendix C, above].

The Committee must therefore establish whether the laws and actions of the State, and the behaviour and conditions of the condemned person, make it possible to determine whether the time elapsed between sentencing and execution is reasonable and, on that basis, that it does not constitute a violation of the Covenant. Those are the limits of the Human Rights Committee's competence to determine whether there has been compliance with, or violation of, the provisions of the International Covenant on Civil and Political Rights.

I concur with the majority opinion that in this case, there has been a violation of articles 7 and 10 of the Covenant, although not only for the reasons given in the majority decision, but also because of the time spent by the author on death row.

(Signed) Francisco José Aguilar Urbina

CC. Communication No. 600/1994, Dwayne Hylton v. Jamaica (views adopted on 16 July 1996, fifty-seventh session)*

Submitted by: Dwayne Hylton [represented by counsel]

Victim: The author

State party: Jamaica

Date of communication: 21 October 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 July 1996,

Having concluded its consideration of communication No. 600/1994, submitted to the Human Rights Committee on behalf of Mr. Dwayne Hylton under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author's counsel and by the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Dwayne Hylton, a Jamaican citizen currently under sentence of life imprisonment in Jamaica. A death sentence imposed on the author in May 1988 was commuted by the Governor-General of Jamaica in 1995. A prior communication submitted by Mr. Hylton was examined by the Human Rights Committee in case No. 407/1990;[a] in respect of that communication, the Committee adopted views on 8 July 1994 and found violations of articles 7 and 10 of the Covenant. In the present communication, Mr. Hylton once more complains about violations by Jamaica of articles 7 and 10 of the Covenant. He is represented by counsel. On 22 November 1995, the State party informed the Committee that the author's death sentence had been commuted to life imprisonment.

The facts as submitted by the author

2.1 Dwayne Hylton was convicted of murder and sentenced to death on 26 May 1988 by the Circuit Court in Manchester, Mandeville, Jamaica. His appeal was dismissed by the Court of Appeal of Jamaica on 16 May 1990. A further petition for special leave to appeal was dismissed by the Judicial Committee of the Privy Council on 29 October 1992.

2.2 Counsel notes that, in practice, constitutional remedies are not available to Mr. Hylton, since he is indigent and the State party does not make available legal aid for the pursuit of constitutional motions. By reference to the Committee's established jurisprudence, counsel submits that all available domestic remedies within the meaning of article 5, paragraph 2 (b), of the Optional Protocol have been exhausted.

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* Pursuant to rule 85 of the rules of procedure, Committee member Laurel Francis did not take part in the adoption of the views. The text of an individual opinion of one Committee member is appended.

The complaint

3.1 It is submitted that Mr. Hylton is a victim of a violation of articles 7 and 10 of the Covenant, in view of the length of time spent on death row. Since his conviction in May 1988 and until the early summer of 1995, i.e., for seven years, the author was held in the death row section of St. Catherine District Prison. At the time of submission of the communication, counsel argued that that delay (approximately six years at that time) would bring Mr. Hylton's execution within the ambit of article 7 and constitute cruel, inhuman and degrading treatment. Reference is made to the judgement of the Judicial Committee of the Privy Council in Pratt and Morgan v. Attorney-General of Jamaica[b] in which it was held, inter alia, that delays exceeding five years in carrying out the execution of a capital sentence constitute cruel and inhuman treatment under the Jamaican Constitution. According to counsel, that delay is in itself sufficient to constitute a violation of articles 7 and 10, paragraph 1, of the Covenant.

3.2 Counsel further contends that the conditions of detention at St. Catherine District Prison, where the author was detained from May 1988 to the summer of 1995, violate his rights under articles 7 and 10, paragraph 1. Reference is made in this context to a report released by an American non-governmental organization in 1990, which was highly critical of conditions of detention at St. Catherine District Prison.[c]

3.3 Counsel requests that the Committee recommend the commutation of the author's death sentence to life imprisonment.

The State party's information and observations on admissibility and counsel's comments thereon

4.1 In its submission under rule 91 of the rules of procedure, dated 19 January 1995, the State party argues that the communication is inadmissible as an abuse of the right of submission, pursuant to article 3 of the Optional Protocol. It recalls that the author's initial complaint was transmitted to the Jamaican authorities on 28 August 1990, two years and two months before the dismissal of his appeal by the Judicial Committee. The author's initial complaint under article 14 of the Covenant was declared inadmissible for non-exhaustion of domestic remedies. Mr. Hylton had more than 12 months after the dismissal of his petition by the Privy Council to lodge supplemental claims, while his initial complaint was still being considered by the Committee. Instead, he only submitted a new complaint more than three months after the adoption of views on his earlier communication. The State party considers this "to be a tactic designed to unnecessarily prolong the process in a manner which amounts to abuse of the right of submission".

4.2 The State party adds that it is established under domestic law that the judicial process must be used bona fide and must not be abused. Courts will prevent the judicial machinery "from being used as a means of vexation and oppression in the process of litigation". The State party considers it to be an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings; in its opinion, that approach should also govern the Committee's procedure: "[t]o allow the author to bring a new communication on these issues at this stage would be to allow him to prolong proceedings before the Committee, and increase the burden on the State party in terms of dealing with issues and having the relevant investigations done at least in this late stage".

4.3 Notwithstanding the above, and in "the interest of expediting" consideration of the case, the State party offers the following observations on the merits of the author's complaint. With respect to the alleged violation of articles 7 and 10, paragraph 1, of the Covenant because of the length of time spent on death row, it refutes the view that the Judicial Committee's judgement of 2 November 1993 in the case of Pratt and Morgan v. Attorney-General of Jamaica is the authority for the proposition that a person has been subjected to cruel and inhuman treatment if he has been on death row for more than five years. Rather, the State party claims, each case must be examined on its own merits in order to determine whether or not there has been a violation of constitutional rights.

4.4 The State party contends that the argument in the above paragraph is supported by the Committee's own jurisprudence, notably in its views on the case of Pratt and Morgan,[d] in which it was argued that: "In principle prolonged judicial proceedings do not per se constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for convicted prisoners. However, ... an assessment of the circumstances of each case would be necessary" (emphasis added by the State party).

5.1 In her comments dated 3 March 1995, counsel refutes the State party's contention that the communication is an abuse of the right of submission. She denies that the doctrine of res judicata, either in its narrow or in its wide application, would apply to the present communication.

5.2 Counsel concedes that the doctrine of res judicata may apply to the procedure under the Optional Protocol and that the legal basis for such an interpretation may be found in article 3 of the Protocol. However, she denies that Mr. Hylton's communication raises issues of res judicata or that it falls within the ambit of article 3 of the Protocol for any other reason. Unlike the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Optional Protocol does not contain a res judicata clause; counsel concedes that if the author of a communication were to resubmit, without alteration, a submission previously declared inadmissible or already considered by the Committee, that would amount to an abuse of the right of submission. Inadmissibility for abuse of the right of submission might also extend to instances in which false declarations are made to mislead the Committee or in which the author of a complaint fails to supply the necessary information or substantiate assertions after repeated requests.

5.3 In counsel's opinion, none of the above criteria apply to her client's case. She explains that in the initial communication filed by Mr. Hylton, the alleged violations of articles 7 and 10, paragraph 1, were based on continued threats to, and ill-treatment of, the author by prison warders. It was in that respect that the initial complaint was declared admissible in October 1992, and views with a finding of violation of articles 7 and 10, paragraph 1, were adopted in July 1994. At no point in the course of examination of the initial communication did Mr. Hylton raise the issue of violations of articles 7 and 10, paragraph 1, because of the length of time he had spent on death row. In short, the "death row phenomenon" issue was never considered by the parties and by the Committee in the initial case: thus, a narrow application of the "res judicata" doctrine cannot apply to the present complaint.

5.4 Counsel recalls that in this case her client complains only that detention on death row for close to seven years (as of 3 March 1995) violates his rights under articles 7 and 10, paragraph 1: the issue of length of detention on death row could not have been raised with any prospect of success in the earlier

communication, which was filed at a time when Mr. Hylton had been detained on death row for just over two years. Therefore, it is clearly facts subsequent to the initial communication - i.e., prolongation of his detention on death row - that are at the basis of the present communication. As they could not have been raised in the earlier proceedings, counsel argues that the present case cannot be considered an abuse of process even under a broadly interpreted doctrine of res judicata.

5.5 Counsel rejects as without foundation the State party's contention that the present communication is designed to prolong proceedings in the case, as no other procedures which the present complaint could prolong are currently pending.

5.6 In a letter dated 30 May 1995, the author considers that his death sentence should have been commuted on the basis of the Judicial Committee of the Privy Council's guidelines in the Pratt and Morgan judgement. He claims that, as execution warrants have recently been delivered to some fellow inmates, he continues to "live in constant fear of the hangman".

Decision on admissibility and examination of the merits

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the author had submitted an earlier communication to the Committee, in respect of which views were adopted on 8 July 1994. The State party argues that the claims which are at the basis of the present communication could and should have been raised in Mr. Hylton's initial communication and that the fact that they were used to formulate a new complaint before the Committee makes the communication inadmissible as an abuse of the right of submission, pursuant to article 3 of the Optional Protocol.

6.3 The Committee does not share the State party's assessment. While it is correct that the author of a communication is required to display due diligence in the presentation of his/her claims, and that it is conceivable that the sequential introduction, in the course of consideration of a case, of claims which could have been formulated at the time of the initial submission may constitute an abuse of process, that does not apply if the author of a case whose examination is concluded subsequently raises new claims which he could not have raised in the context of the previous complaint. In the Committee's opinion, issues of res judicata do not arise in the latter hypothesis.

6.4 In the instant case, Mr. Hylton formulates a claim related to the so-called "death row phenomenon". That claim was not at issue in his earlier case, in respect of which views were adopted in July 1994. Given that he had been detained on death row for slightly over two years when he submitted his initial complaint, he could not have argued with any reasonable prospect of success that the length of his detention on death row was, at that time, contrary to articles 7 and 10, paragraph 1, of the Covenant. When submitting his second case on 21 October 1994, the factual situation had changed by virtue of the prolongation of his detention on death row. In those circumstances, the present complaint does not amount to an abuse of process; nor does the Committee consider that it "unnecessarily prolongs" the judicial process, as the claim at issue in the present communication has never been adjudicated.

6.5 The Committee must further consider whether domestic remedies remain available to the author. By note verbale dated 22 November 1995, the State party informed the Committee that the author's death sentence had been commuted to life imprisonment by the Governor-General of Jamaica upon advice of the Jamaican Privy Council. The State party has not informed the Committee of any further remedy available to the author in respect of his claim under articles 7 and 10, paragraph 1; the Committee notes that a constitutional motion is not available to the author in practice, as no legal aid is made available for the purpose.

6.6 Accordingly, the Committee considers the present communication admissible insofar as the author's claim relating to the length of detention on death row is concerned.

6.7 In respect of the claims under articles 7 and 10, paragraph 1, related to the author's conditions of detention at St. Catherine District Prison, the Committee notes that they have not been substantiated other than by a general reference to a report prepared by a non-governmental organization in 1990. No further details on the author's specific condition have been adduced. In this respect, the Committee concludes that counsel has failed to advance a claim within the meaning of article 2 of the Optional Protocol.

7.1 Having determined that the communication is admissible insofar as the author's claim relating to prolonged detention on death row is concerned, the Committee considers it appropriate in this case to proceed to an examination of the merits. In this context, the Committee notes that the State party, in the interest of expediting the matter, has offered comments on the merits of the communication. The Committee recalls that article 4, paragraph 2, of the Optional Protocol stipulates that the receiving State shall submit its written explanations on the merits of a case within six months of the transmittal of the communication to it for comments on the merits. The Committee finds that that period may be shortened, in the interests of justice, if the State party so agrees. It further notes that author's counsel, in her submission of 3 March 1995, acquiesces to the examination of the merits, without offering further comments.

7.2 Accordingly, the Committee proceeds, without further delay, to the examination of the substance of the author's claim concerning the length of his detention on death row in the light of all information made available by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8. The Committee must determine whether the length of time the author spent on death row - seven years - amounts to a violation of articles 7 and 10, paragraph 1, of the Covenant. Counsel has claimed a violation of those provisions merely by reference to the length of time Mr. Hylton was confined to death row. It remains the Committee's jurisprudence that detention on death row for a specific time does not violate articles 7 and 10, paragraph 1, of the Covenant, in the absence of further compelling circumstances. The Committee refers in this context to its views on communication No. 588/1994 (see section W above), in which it explained and clarified its jurisprudence on the issue of the death row phenomenon. In the Committee's opinion, neither the author nor his counsel have shown the existence of further compelling circumstances beyond the length of detention on death row. While a period of detention on death row of seven years is a matter of concern, the Committee concludes that that delay does not per se constitute a violation of articles 7 and 10, paragraph 1.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee do not reveal a violation by Jamaica of any of the provisions of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40 (A/49/40), vol II, annex IX.M.

[b] Privy Council Appeal No. 10 of 1993; judgement delivered on 2 November 1993.

[c] Human Rights Watch, Prison Conditions in Jamaica, 1990.

[d] See Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40), annex X.F, communications Nos. 210/1986 and 225/1987, views adopted on 6 April 1989, para. 13.6.

Appendix

[Original: Spanish]

Individual opinion of Committee member Francisco José Aguilar Urbina

The way in which the majority opinion on the communication submitted by Mr. Dwayne Hylton against Jamaica has been expressed obliges me to express my individual opinion. The majority opinion simply reiterates previous jurisprudence which has established that the death row phenomenon does not per se constitute a violation of article 7 of the International Covenant on Civil and Political Rights. The Committee has repeatedly maintained that the mere fact of being sentenced to death does not constitute cruel, inhuman or degrading treatment or punishment. In my opinion, the Committee is wrong to seek inflexibly to maintain its jurisprudence without clarifying, analysing and appraising the facts before it on a case-by-case basis. In the case of the present communication, the Human Rights Committee's wish to be consistent with its previous jurisprudence has led it to rule that the length of detention on death row is in no circumstances contrary to article 7 of the Covenant.

The majority opinion seems to be based on the supposition that only a total reversal of the Committee's jurisprudence would allow it to decide that an excessively long stay on death row could entail a violation of that provision. In this respect, I would refer to my opinion and analysis in connection with communication No. 588/1994 (Errol Johnson v. Jamaica). In particular, I would also draw attention to my observations on the lack of cooperation by the State party. [See section W, appendix C, above.]

The Human Rights Committee is responsible for ensuring that the provisions of the International Covenant on Civil and Political Rights are not violated as a consequence of the execution of a sentence. I therefore emphasize that the Committee must examine the circumstances on a case-by-case basis. The Committee must establish the physical and psychological conditions to which the condemned person has been subjected in order to determine whether the behaviour of the government authorities is in accordance with the provisions of articles 7 and 10 of the Covenant.

The Committee must therefore establish whether the laws and actions of the State, and the behaviour and conditions of the condemned person, make it possible to determine whether the time elapsed between sentencing and execution is reasonable and, on that basis, that it does not constitute a violation of the Covenant. Those are the limits of the Human Rights Committee's competence to determine whether there has been compliance with, or violation of, the provisions of the International Covenant on Civil and Political Rights.

Nevertheless, in the present case the State cannot be held responsible for the amount of time which has elapsed (six years at the time of submission of the communication), since much of that time has been devoted to exercising the remedies which Jamaican law grants to the condemned person for challenging the sentence. Accordingly, I also find that there has been no violation of articles 7 and 10 of the Covenant.

(Signed) Francisco José Aguilar Urbina

ANNEX IX

Decisions of the Human Rights Committee declaring communications inadmissible under the Optional Protocol to the International Covenant on Civil and Political Rights

A. Communication No. 472/1991, J. P. L. v. France (decision adopted on 26 October 1995, fifty-fifth session)

Submitted by: J. P. L. [name deleted]

Alleged victims: The author and his sons, M. and A. [names deleted]

State party: France

Date of communication: 16 August 1991 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 October 1995,

Adopts the following decision on admissibility.

1. The author of the communication is J. P. L., a French citizen born in 1946 and currently residing in Neuilly-sur-Seine, France. He submits the communication on his own behalf and that of his sons M. (born in 1977) and A. (born in 1981). He claims that he and his sons are victims of violations by France of articles 18, paragraph 4; 23, paragraph 4; and 24, paragraph 1, of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author married in 1974. At the beginning of 1988, his wife filed for divorce, and on 15 December 1988, the Tribunal of Nanterre (Tribunal de Grande Instance de Nanterre) pronounced the divorce. Mr. L. notes that the decision was reached in his absence and explains that in divorce proceedings in France, legal representation is mandatory. At the time, because of his position in a state-owned bank and his salary, he did not qualify for legal aid; he claims, however, that he would have incurred heavy debts had he retained a lawyer privately, especially in the light of substantial expenditures incurred by his departure from the family home.

2.2 The judgement of 15 December 1988 awarded custody of the children to the mother; the author was granted what are considered to be customary visiting rights, i.e. every second weekend and for half of the yearly school vacations. He was further ordered to pay 3,500 FF per calendar month to his ex-wife.

2.3 In the summer of 1989, the author noted that the school results of his older son, M., were deteriorating, notably in mathematics and foreign languages, and that he was becoming obese. He therefore decided: (a) to take his son to the children's hospital in Paris for regular medical checks; (b) to buy two additional small personal computers and home education programmes so as to enable his sons to "study more efficiently" on the occasions of their visits; and (c) to request the family judge to allow him to see his sons every weekend.

From the documents submitted by the author, it transpires that the author requested several postponements of appointments at the children's hospital, arguing that his son had to attend school classes every morning.

2.4 On 30 August 1989, Mr. L. was ordered by the judge responsible for matrimonial and custody matters (juge aux affaires matrimoniales) of the Tribunal de Grande Instance de Nanterre to present himself the following day. On 1 September 1989, the judge, upon hearing the author, his ex-wife and the children, decided to suspend the author's visiting rights temporarily. She indicated that such a step was necessary because the author had made numerous incriminating comments with sexual connotations ("propos orduriers") to his sons and asked them repeated questions about the sexual behaviour of their mother. Moreover, the children had complained, by letter dated 11 June 1989 addressed to the family judge, about the difficult living conditions at their father's home and about their being asked to study in his studio.

2.5 On 11 December 1989, the same judge ordered a social inquiry ("enquête sociale") and a psycho-medical examination ("examen psycho-médical") of both parents in order to determine under what conditions the author might be allowed to exercise his visiting rights. The results of the study were to be transmitted to the judge within three months. On 13 July 1990, the family judge again heard the parties, including the author's older son, and examined the report of the social inquiry. The author confirmed that he had refused to meet with the social worker and explicitly stated that he would not submit to any psycho-medical examination. As a result, and on the basis of the report of the social inquiry as well as the wishes of the author's sons, the suspension of the author's visiting rights was confirmed.

2.6 Mr. L. does not deny the charges referred to in paragraph 2.4 above but contends that his behaviour in no way justified the suppression of his visiting rights. He submits that the absence of contacts with their father has been highly prejudicial to his sons' development and education. In this context, he explains that he holds a university degree, whereas his ex-wife does not; he observes that he used to enrol his older son in language courses (a two-week course in English and a two-week course in German) during summer vacations, which regrettably is no longer possible. Moreover, he can no longer impart to his sons his skills as a programmer of PC software and direct them towards higher studies in information technology, skills which he considers to be indispensable for their future career development.

2.7 The author appealed the decision of 1 September 1989. On 23 February 1990, the Court of Appeal of Versailles dismissed his appeal. The Court of Cassation rejected his further appeal on 9 April 1991. Subsequent letters to the Minister for Justice (Garde des Sceaux) and President Mitterrand did not change the situation, as the author was informed by the office of the Garde des Sceaux and the President that they could not interfere with pending judicial procedures.

2.8 The author continued his efforts to obtain custody of his sons or "at least daily visiting rights". On 13 March 1991, he filed another request to that effect with the family judge at Nanterre. He justified his request with the allegedly unsatisfactory school results of his sons and his desire to assist them in their studies. A hearing took place on 15 May, and the children were convoked for a separate hearing on 5 June 1991. On that date, only M. met with the judge, whereas A. sent a confidential letter.

2.9 On 10 July 1991, the judge confirmed the suspension of the author's visiting rights for a duration of three years (i.e., until 10 July 1994). In

her decision, the judge stated that the author's obsession with his sons' school education had eliminated every sign of affection vis-à-vis them and interest in their development, and that the sons were exasperated by the situation ("Le surinvestissement par le père de la réussite scolaire arrive à gommer toute manifestation d'affection et d'intérêt de sa part envers ses fils qui vivent très mal cette situation.").

2.10 The author adds that, as a result of the above events, he was dismissed from his post. After several written warnings from his employer and invitations that he agree to be treated "for personal and professional difficulties", which he refused to do, the employer terminated the author's contract with effect from 31 January 1991.

2.11 After the family judge's decision of 10 July 1991, the author stopped having direct contacts with his sons. He continued, however, to write to them on a regular basis (over 100 letters between July 1991 and July 1994). His ex-wife moved away from Paris, and the author's efforts to ascertain where his sons were enrolled in school were unsuccessful. On 1 April 1993, the police brought the author to a psychiatric institution located approximately 60 kilometres from Paris. He indicates that there were no grounds for assigning him to that institution for treatment of psychological disorders. On 25 June 1993, he was released.

2.12 Between December 1993 and August 1995, the author did not provide further information on his case. By letters dated 13 August and 17 September 1995, he indicates that by injunction ("ordonnance de référé") of 8 July 1994 handed down by the family judge at the Tribunal de Grande Instance de Caen, the suspension of his visiting rights was extended for another three years, until July 1997. In her decision, the judge, who had heard the parties on 4 July 1994, concluded that while the author had not seen his sons since 1991, he had addressed regular letters to them, reminding them of his proximity and their duties and thereby reinforcing a sentiment of animosity and persecution in his sons. Furthermore, in eight letters sent to them between 24 April and 24 June 1994, he had informed them of the imminent resumption of his visiting rights and of his intention to spend his vacations with them as of 11 July 1994. The tone of the letters, the fact that the author did not even consult with his sons, then aged 13 and 17 years, and the latters' exasperation with their father's attitude, manifested in various letters, led the judge to conclude that an extension of the suspension order was justified.

2.13 The author dismisses the order of 8 July 1994 as an "arbitrary refusal" to let him see his sons. He requests compensation from the State party for the moral prejudice caused to him and his sons by the court orders. In addition, he requests that he be examined by a foreign psychiatrist, as he suspects that he was subjected to arbitrary internment from April to June 1993.

The complaint

3. The author contends that the above events constitute violations by France of article 18, paragraph 4, of the Covenant because, as the father, he cannot ensure the moral education of his sons. He further invokes article 23, paragraph 4, on the ground that the equality of spouses was not respected upon dissolution of his marriage and that no measures were taken to ensure the necessary protection of his sons. Finally, he claims a violation of article 24, paragraph 1, because the French authorities allegedly did not take any measures for the protection of his minor sons.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee has noted the author's claims related to article 18, paragraph 4, and article 24, paragraph 1, of the Covenant. It observes that the author has failed to show how the State party has in concreto restricted the liberty of parents to ensure in general the moral education of their children or failed to take measures for the protection of minors, including the author's sons. Rather, the State party's judicial authorities took measures in the present case, under the French Civil Code, which were designed to serve the best interests of the author's sons. In that respect, therefore, the author has failed to advance a claim within the meaning of article 2 of the Optional Protocol.

4.3 With respect to article 23, paragraph 4, of the Covenant, the Committee accepts that that provision grants, barring exceptional circumstances, a right to regular contact between children and both parents.[a] The material before the judges seized of the case clearly supported the conclusion that there were special circumstances which justified a denial of the author's access to his sons, in the interest of the children. The author has not advanced any grounds to show that the material before the courts could not support such a conclusion. In this respect, therefore, the Committee equally concludes that the author has made no claim within the meaning of article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 2 of the Optional Protocol;

(b) that this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] See Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40), vol. II, annex X.J, communication No. 514/1992 (Fei v. Colombia), views adopted on 4 April 1995, para. 8.9; see also general comment No. 19 (39), on article 23 (ibid., Forty-fifth Session, Supplement No. 40 (A/45/40), vol. I, annex VI.B, para. 6.

B. Communication No. 557/1993, X v. Australia (decision adopted on 16 July 1996, fifty-seventh session)*

Submitted by: X [name deleted] [represented by counsel]

Victim: The author

State party: Australia

Date of communication: 1 March 1993 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 July 1996,

Adopts the following decision on admissibility.

1. The author of the communication is X, a member of the Wiradjuri Aboriginal Nation of New South Wales and an initiated member of the Arrente Nation of Central Australia. He submits the communication on his own behalf and on behalf of his three children, born in 1977, 1979 and 1983, respectively. He claims violations by Australia of articles 14, paragraph 1; 18, paragraphs 1 and 4; 23, paragraph 1; 26 and 27 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author and his ex-wife, who is not Aboriginal, lived together from 1976 to 1990. It is stated that a marital relationship under Aboriginal law was already established before they entered into a marriage under the Marriage Act 1961 on 9 March 1982. In May 1990, the author and his wife separated; his wife subsequently initiated proceedings in the Family Court of Australia for custody of and access to their three children, and division of property. In March 1992, the Family Court granted custody to the mother and right of access to the author, and divided the property.

2.2 During the proceedings before the Family Court, the main item of property in dispute was the matrimonial home, a house purchased by the author with a loan from the Aboriginal Development Corporation, a government body set up to provide housing funds to Aboriginal people. As to the issues of custody of and access to the children, the author sought to maintain the prior arrangement of joint custody, since in his opinion it would give the children fair exposure to both the Aboriginal and the European culture. The wife's request for sole custody was based, inter alia, on the fact that the author was absent from home for a considerable part of the year because of his activities in Aboriginal affairs both in and outside of Australia. The author argued that, in accordance with Aboriginal practice, his extended family would take care of his children during his absence.

2.3 On 28 November 1991, a hearing on the admissibility of the affidavit evidence was held. With regard to the matrimonial home, evidence was given by the author and his family members that he and the children had considerable input in the house through renovating it, that it was purchased with a low-

* Pursuant to rule 85 of the rules of procedure, Committee member Elizabeth Evatt did not participate in the examination of the communication.

interest loan which he had obtained because of his aboriginality, and that they considered it to be Aboriginal land. It is submitted that most of that evidence was ruled inadmissible as being irrelevant.

2.4 In response to his wife's application for sole custody of their children, the author submitted affidavits from himself and members of his family and from prominent members of the Aboriginal and Anglo-Australian community. It was submitted, inter alia, that the author's extended Aboriginal family in the Sydney area alone consists of eight sisters and their husbands and children and that the grandmother plays a significant role in the rearing of the children, e.g., teaching them Aboriginal customary law and the Wiradjuri language. Furthermore, it was explained that in Aboriginal custom, the children of one set of biological parents are, from the age of toddlers upwards, integrated into the family structure of their uncles and aunts so that their biological cousins become as close as brothers and sisters. When either biological parent is unavailable to supervise the children, the family immediately takes over the caring role so that there is no social or emotional disruption of the children's daily routine. It was further submitted that, since the European invasion, the practice of sharing childcare responsibilities has been an important survival mechanism for the Aboriginal people and their culture, as Anglo-Saxon Australian institutions have often interfered with Aboriginal families.

2.5 The author complains that most of the affidavit material filed on his behalf had been struck out, either under the rules of evidence of the Family Court or on public policy grounds. In this context, it is submitted that any references to the aboriginality of the three children were struck out as being irrelevant to the consideration of what would be in their long-term "best interest". Evidence given by Aboriginal society members as to the effect on them personally after having been removed from Aboriginal society as children and raised as "Whites" in the assimilation process was struck out, as were affidavits by academics who had studied the assimilation process and its effect on Aboriginal children. Furthermore, evidence given by the author's sisters about the way in which Aboriginal children were raised and cared for by more than one family member in an extended family was ruled inadmissible. The judge also ruled inadmissible an affidavit from an elder of the Arrente Nation who testified that in early 1992 the author would be attending initiation rites with the Arrente Nation in the Northern Territory and that, under Aboriginal law, the author had no control over the time or circumstances of his initiation.

2.6 After the hearings on the admissibility of the evidence, the issues of custody, access and settlement of property were scheduled to be heard before another judge of the Family Court on 3 March 1992. On that day, however, the author's counsel requested an adjournment on the grounds that the author had been admitted to hospital on 2 March 1992, following a ritual circumcision from which an infection had ensued. It is submitted that the wife's counsel made racist and offensive comments about the author and the initiation wound and suggested that the wound was self-inflicted in order to delay the proceedings, questioning the seriousness of the author's medical condition, since he had been able to attend court on 28 February 1992. It is further submitted that the judge did not prevent counsel from making such comments, but instead treated the application with overt scepticism, suggesting that the wound had been self-inflicted and that the expert witnesses were "led along by the nose". The application for adjournment was dismissed, as well as the author's application to have the custody and property matter heard in a different court on the grounds that the Family Court had no jurisdiction.

2.7 On 4 March 1992, the author's counsel again applied for an adjournment, as the author was still in hospital. The vascular surgeon again testified that the author's condition did not allow him to attend court. While expressing doubt about the sincerity of the author, the judge granted the application.

2.8 The case came before the judge again on 9 March 1992. The author, however, contested the court's competence to deal with the case since, in his opinion, the Family Court lacked jurisdiction to determine Aboriginal family and property issues. The judge refused to declare the court incompetent, upon which the author and his counsel withdrew from the proceedings. The judge then proceeded to determine the issues of custody, access and settlement of property on the basis of the remaining material before him, and after hearing the evidence of the wife and the Court Counsellor, who had prepared a family report, custody was awarded to the wife; the author was given the right of access to the children on alternate weekends, during school holidays and at such other times as were mutually agreed upon, provided that in case he was absent during such periods, he would inform his ex-wife about which family members would supervise the children on his behalf. The judge further ordered the author to pay his ex-wife within two months 75 per cent of the value of the matrimonial home, upon which her title would be transferred to him. If the author refused or failed to pay her on or before 9 May 1992, he would have to vacate the house within 14 days, and his ex-wife would then be authorized to take care of its sale. Furthermore, the author was ordered to pay his ex-wife's costs in the proceedings and the outstanding costs of the hearings of 28 November 1991 and 3 March 1992.

2.9 On 7 April 1992, the author filed a notice of appeal to the Full Court of the Family Court against the orders of 9 March 1992, which related to the property, access and custody issues. An amended notice of grounds of appeal was filed on 7 May 1992. The final notice of appeal is dated 26 May 1992. The author argued, inter alia, that the Family Court had no jurisdiction in the case and that the trial judge was biased, and raised questions with regard to the Commonwealth Constitution and its interpretation. The appeal was first scheduled to be heard on 6 August 1992, but because of the author's anticipated absence from Australia it was eventually set for hearing on 17 November 1992.

2.10 Pending the appeal, the author applied, on 7 May 1992, to the Family Court for a stay of the orders of 9 March 1992. The stay application was scheduled to be heard on 29 May 1992. The author, however, was not present at that hearing as he was at a meeting of the Aboriginal and Torres Strait Islander Commission in Canberra. It is submitted that the judge made adverse comments in relation to that and did not allow counsel to explain why a stay was sought. The judge then refused to stay the orders. The costs of the hearing were awarded against the author.

2.11 On 8 July 1992, a further application for a stay of the custody and property orders was heard. By judgement of 15 July 1992, the application was dismissed insofar as it related to the custody order; a stay of the order requiring sale of the former matrimonial home was granted until 22 July 1992, on condition that the author would vacate the house, so that his ex-wife and the children could live in it pending a further order, and would pay his ex-wife's costs in the proceedings of 28 November 1991 and 3 March 1992. Again, the costs of the hearing were ordered against the author on the grounds that he benefited from free legal representation by the Aboriginal Legal Service, that he was in a better financial position than his ex-wife and that the delays in the proceedings were attributable to him.

2.12 The author explains that he did not pursue an appeal against the judge's decision since such an appeal would have to be made to the Full Court of the Family Court, which generally is reluctant to interfere with the interlocutory decisions made by the lower courts.

2.13 It appears that the author again failed to comply with the court's orders within the time specified therein. Instead of vacating the house, he offered to pay his ex-wife the sum provided for in the orders of 9 March 1992, which she rejected. On 24 July 1992, the author requested the court to order his ex-wife to transfer her title and interest in the house to him; his ex-wife filed a cross-application for the author's detention. Both applications were dismissed and the author was ordered to vacate the house within 24 hours. Costs were also ordered against him. The author then vacated the house, which was subsequently put up for sale by his ex-wife in compliance with the orders of 9 March 1992.

2.14 On 28 August 1992, in the High Court of Australia before a single judge, the author applied for orders nisi for writs of prohibition and certiorari directed to the Family Court, on the ground that the Family Court had no jurisdiction over Aboriginal people and their children and property. He argued, inter alia, that he is a descendant of the Wiradjuri people who have a long and unbroken tradition of resistance to the "unprovoked aggression, conquest and attempted genocide" to which they have been subjected since the English invasion, that neither he nor his people has ever asked for Australian citizenship and that neither he nor his people has ever received the protection which is an essential precondition of any allegiance that may be demanded from them or owed by them to the Commonwealth and State authorities which may purport to exercise jurisdiction, management or control over them, their children or property. The author requested the court to expand on its findings in the case of Mabo v. State of Queensland,[a] and to clarify the status of Aboriginal people in the Anglo-Australian legal system, by recognizing the existence of a tradition of Aboriginal law and custom which establishes Aboriginal law concerning matrimonial matters. The judge refused the application on the ground that there was no realistic prospect that the Full Court of the High Court would find that the Family Court lacked jurisdiction on the grounds, and for the reasons, upon which the author relied.

2.15 As to the exhaustion of domestic remedies, it is submitted that, on 30 October 1992, pending the author's appeal to the Full Court of the Family Court, a notice of intervention was filed by the Attorney-General of the Commonwealth, on the basis that the appeal related to matters arising under the Constitution or involving its interpretation and concerning the public interest. After having been advised by lawyers with experience in family and constitutional matters that the appeal would not be successful in the light of what had been said in the High Court, and in view of the fact that costs had been awarded against him in every previous action in the Family Court, the author decided to withdraw his appeal.

The complaint

3.1 It is claimed that the racism and ethnocentrism allegedly displayed by the Family Court of Australia violated several of the author's rights under the Covenant.

3.2 As to the author's claim under article 14, paragraph 1, of the Covenant, counsel submits that the transcripts show that the Family Court lacks the necessary impartiality to hear and determine cases involving Aboriginal people because of the way in which family law practice in Australia is apparently

weighted to an Anglo-Saxon notion of what constitutes a family group. Counsel points out that the laws of evidence as applied by the Family Court had the effect of removing most of the material about the importance of aboriginality as a factor for consideration in a custody and property matter; the court justified the exclusion of that evidence on the grounds of public policy or generality. It is submitted, however, that the court's impartiality was hampered by the laws of evidence and underlying racism which made it decide as it did. Counsel reiterates that the Family Court, by basing itself on Anglo-European notions of culture, family and justice and by rejecting evidence relating to the author's and his children's aboriginality, violated their right to a fair hearing.

3.3 It is submitted that the author's right to adopt and practice Aboriginal beliefs under article 18, paragraph 1, of the Covenant was violated by the Family Court judges, who made disparaging comments about the initiation ceremony and ruled inadmissible the evidence relating to it. Furthermore, the author's freedom to ensure that his children receive a complete Aboriginal religious and moral education is said to have been violated by the Family Court judges who ruled inadmissible the author's and his family's evidence concerning their Aboriginal beliefs; it is submitted that, therefore, that particular aspect of the children's lives, following the dissolution of their parents' marriage, was not taken into consideration by the judge who decided on the custody. In this context, it is submitted that at all times during the proceedings, the author's ex-wife was given the opportunity to explain along what moral grounds she would raise the children but that the author was denied such an opportunity.

3.4 In respect of article 27 of the Covenant, it is submitted that that article has been violated because of the way in which the Family Court dealt with the issue of the tribal initiation. The author explains that the nature of the initiation ceremony should never have been broadcast in any forum, as it was sacred knowledge to him and the people of the Arrente Nation. He submits that it was difficult for him to instruct his solicitors to explain the problem which arose out of the initiation ceremony to the judge. The judge, however, by insisting on a full explanation, made it impossible to avoid the sacred knowledge becoming public and, therefore, denied him the right to practise his people's culture in the way he was required to do.

3.5 Finally, the author claims that the Court's rejection of the elders' evidence on the Aboriginal family kinship structure amounts to a violation of article 23, paragraph 1, of the Covenant, since that shows that the Aboriginal family unit was not afforded any kind of protection in the proceedings. In this connection, the author states that he and his family had attempted to accept a European woman into their family, and not vice versa.

The State party's observations on admissibility

4.1 In February 1995, the State party submitted its observations on the admissibility of the communication. The State party requests the Committee to ensure that its decision concerning the communication will not contain any material identifying the author and his ex-wife, in order to protect their three children.

4.2 The State party explains that, under Australian law, the Family Court has jurisdiction over matrimonial matters and dissolution of marriages of Australian citizens and residents, as well as over matters relating to children, including custody and access. The State party notes that the author, although having raised the question of jurisdiction of the Family Court in the domestic system, does not raise that issue for consideration by the Committee under the Optional

Protocol. The State party further notes that the author, in his answer to the filing of his wife's case in 1990, admitted jurisdiction and that later he did not present evidence in support of his contention that there was a subsisting Aboriginal marriage, nor did he suggest any other court that might have been competent to hear the matter. The State party explains that there is no judicial recognition of any Aboriginal laws, customs or traditions relating to marriage, but that the author and his wife had entered into a marriage under the Marriage Act 1961, providing the basis for the Family Court's jurisdiction.

4.3 The State party argues that the communication is inadmissible for failure to exhaust domestic remedies. In this connection, the State party notes that the author withdrew from the proceedings at an early stage at first instance and subsequently withdrew his appeal to the Full Court of the Family Court. In this context, the State party submits that it would have been open to the author to argue before the Full Court that a miscarriage of justice had occurred on the basis that relevant matters had been given insufficient weight. As regards the author's argument that he had been advised that his appeal would not be successful, the State party recalls that doubts about the likelihood of success of remedies do not absolve an author from exhausting them.

4.4 The State party further argues that the part of the communication relating to the Family Court hearing of 28 November 1991 is inadmissible ratione temporis since the Optional Protocol only entered into force for Australia on 25 December 1991.

4.5 As regards the author's claim under article 14, paragraph 1, of the Covenant that the Australian laws of evidence were used to exclude material highlighting the importance of aboriginality, the State party submits that the laws of evidence applied by the Family Court have as their guiding principle the welfare of the children and that that allows for the presentation of material regarding the importance of the Aboriginal cultural heritage in the upbringing of an Aboriginal child. The State party submits that in the instant case such material was indeed presented and taken into account by the Court. In this context, the State party rejects the author's claim that most of the evidence relating to aboriginality was struck out and explains that parts of the evidence presented by the author were ruled inadmissible by the Court on the grounds that they were irrelevant, argumentative, speculative, too general or related to matters of belief.[b]

4.6 Concerning the author's request for an adjournment because of his hospitalization, the State party states that it appears from the hearing on 3 March 1992 that the author had been hospitalized on 2 March on the basis of his own opinion that his condition had worsened; the medical doctors who gave evidence at the hearing had not seen or examined the author since 27 February 1992, when no hospitalization was deemed necessary. In the light of the evidence, the State party argues that the author has not substantiated his allegation that the decision of the judge to refuse the application for adjournment was biased. The State party adds that the adjournment was granted, a day later, after the surgeon gave evidence that he had examined the author and that he was of the opinion that the medication prescribed would affect his ability to concentrate.

4.7 Insofar as the author claims that the division of the property was unfair and showed the judge's bias against him, the State party explains that in considering a property order the Court has to ascertain the past contributions of the parties as well as their future needs and requirements. In the instant case, the judge considered that both parties had made considerable contributions

towards the marriage, but that the husband had a greater (approximately five times as much) capacity for earning an income than the wife and was entitled to superannuation whereas the wife was not. The State party submits that, in the light of the above, and taking into account that the mother would have to provide for the daily care of the children, the distribution of the matrimonial income was reasonable and does not show any bias. As regards the author's statement that the matrimonial house was "Aboriginal land", the State party states that, although original native title to land is recognized under certain conditions, in the author's case such a title did not exist. Furthermore, the State party notes that the author was given the opportunity to retain the house under the original orders of 9 March 1992. Only because he failed to comply with those orders was the house finally sold.

4.8 As regards the author's claim under article 18, paragraph 1, of the Covenant, the State party submits that the courtroom discussion of the author's wound resulting from the initiation ceremony did not in any way violate his freedom of religion. In this context, the State party submits that the transcripts show that the judge drew counsel's attention to the fact that the purpose of the hearing was to determine whether the author could attend court, not to dwell on the details of the ceremony. The State party therefore argues that the author has not raised an issue under the Covenant and, alternatively, that he has failed to substantiate his allegations.

4.9 As regards the author's claim under article 18, paragraph 4, the State party notes that the author has been granted regular access to his children and that the court gave serious consideration to the aboriginality of the author and his children, recognizing the role of the extended family and noting that the children's mother had always played an active part in involving the children in their Aboriginal community. The State party submits that, given all the relevant factors taken into consideration by the Court, as well as the fact that the author withdrew from the proceedings and therefore is estopped from complaining that he did not have an opportunity to address the Court on those issues, the Court's decision was reasonable and did not violate the author's right to ensure the religious and moral education of his children.

4.10 The State party also argues that the author's claim under article 23, paragraph 1, of the Covenant, has not been substantiated. The State party submits that the transcript of the hearings shows that the Aboriginal family unit was given reasonable consideration by the Court, while it considered all matters relevant to the best interests of the child, and that the evidence rejected by the Court was of a general nature and did not relate to the author's children in particular. In this connection, the State party explains that the shared parenting arrangement previously agreed upon by the parties did not work, given the failure of the parents to cooperate, and had led to confusion for the children, who had expressed their dissatisfaction with the arrangement. In its orders, the Court did in fact take the nature of the author's extended family into account when providing for the possibility for the children to stay with the family rather than with the author himself if he were not in a position to supervise them.

4.11 Finally, the State party argues that the author has failed to substantiate his claim that the way in which the judge dealt with the issue of tribal initiation breached his rights under article 27 of the Covenant. In this context, the State party points out that the initiation came up in relation to the author's absence in Court and refers to its observations made above.

5. The author's deadline for submitting comments on the State party's observations expired on 3 April 1995. No comments or further correspondence were received, despite a reminder sent by fax on 26 January 1996.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 Article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering a communication if all available domestic remedies have not been exhausted. The Committee notes that it is undisputed that the author withdrew from the proceedings at the first stage at the Family Court, and subsequently, after having filed an appeal, withdrew his appeal to the Full Court against the judgement of the single judge of the Family Court. The Committee has noted the State party's argument that the appeal constituted an effective remedy in the circumstances of the author's case, as well as the author's assertion that his appeal would not have been successful and that it would be costly.

6.3 The Committee recalls that mere doubts about the effectiveness of remedies do not absolve an individual from exhausting them. All arguments of the author relating to exclusion of evidence and non-consideration of the Aboriginal family structure should have been raised before the Family Court during the original trial and subsequently on appeal. In the instant case, the author has not shown the existence of special circumstances which prevented him from pursuing the domestic remedies available. The communication is therefore inadmissible for non-exhaustion of domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party, to the author and to his counsel.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] The case concerned the status of Aboriginals with respect to Anglo-Australian land rights legislation and litigation; the High Court ruled invalid arguments based upon the "terra nullius" and "protection" principle, finding that Aboriginal law and custom in Murray Island created a system of native title, which survived colonization.

[b] The State party refers, for instance, to reports concerning the removal of Aboriginal children from their family into an institution or foster home, the effect on the Aboriginal community of bringing up Aboriginal children in non-Aboriginal households and parts of the affidavit evidence considered too general and not related to the specific situation of the author's children.

C. Communication No. 573/1994, Harry Atkinson et al v. Canada (Decision adopted on 31 October 1995, fifty-fifth session)

Submitted by: Harry Atkinson, John Stroud and Roger Cyr [represented by counsel]

Alleged victims: The authors and the Hong Kong veterans

State party: Canada

Date of communication: 30 May 1993 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 1995,

Adopts the following decision on admissibility.

1. The authors of the communication are Harry Atkinson, John Stroud and Roger Cyr, Canadian citizens, who submit the communication on their own behalf and on that of the Hong Kong veterans. They claim to be victims of a violation by Canada of article 2, paragraph 3 (a), and article 26 of the International Covenant on Civil and Political Rights. They are represented by counsel.

The facts as submitted by the authors

2.1 The authors belonged to two battalions dispatched by the Canadian Government to Hong Kong in late 1941 for the purpose of defending it from an impending invasion by the Japanese. The Hong Kong garrison was forced to surrender to the Japanese Imperial Forces on 25 December 1941. The surviving members of the Canadian Hong Kong forces were interned in camps operated by the Japanese, both in Japan and in Japanese administered territories. They were liberated in September 1945, following the Japanese surrender to the Allied Forces.

2.2 The authors submit that the conditions in the Japanese camps were inhuman. Maltreatment and torture took place regularly. Prisoners were forced to march long distances under hard conditions, many of those dropping out being killed by the guards. They were forced to do slave labour in tropical heat without protection against the sun. Lack of housing, food, and medical supplies led to disease and death. In this context, reference is made to the judgement of the International Military Tribunal for the Far East of November 1948, which found that it was general practice and indeed policy of the Japanese forces to subject the prisoners of war to serious maltreatment, torture and arbitrary executions, in flagrant violation of the laws of war and humanitarian law.

2.3 As a consequence of the barbaric conditions in the camps, the released prisoners were in bad physical condition and suffered severely from malnutrition with vitamin deficiency diseases such as beriberi and pellagra, and from malaria and other tropical diseases, tuberculosis, tropical sores and the effects of physical ill-treatment. It is submitted that as a direct consequence, the Hong Kong veterans still suffer significant residual disabilities and incapacities.

2.4 The peace treaty of 1952 between Japan and the Allied Forces did not include appropriate compensation for the slave labour and brutality experienced by the Hong Kong veterans. Article 14 of the peace treaty gave Canada the right

to seize Japanese property in Canada. The total amount thus appropriated was slightly over $3 million. With that money the War Crimes Fund was constituted, which granted the Hong Kong veterans a payment of $1.00, later raised to $1.50, per day of imprisonment. No other source of funds was available to satisfy the claims of the veterans and no attempt was made by the Canadian Government to obtain funds from Japan, as it was the Government's position that it had waived all claims against Japan in signing the peace treaty.

2.5 The authors submit that the compensation received falls far short of what can be considered adequate and reasonable. They claim that a payment of $18.00 per day (a total of approximately $23,940 per person) could be considered an appropriate level of compensation for their sufferings.

2.6 The authors refer to a publication by Carl Vincent entitled "No Reason Why" and note that the book shows that they and their colleagues were sent to Hong Kong for purely political reasons at a time when it was known that the Hong Kong garrison could not withstand an attack from the Japanese troops and that there was no hope of evacuating the Hong Kong defenders. It is therefore argued that the Canadian Government was from the outset responsible for their plight and that the disregard for their safety is exacerbated by the Government's later failure to protect their interests in accordance with international law at the time of the entry into force of the peace treaty with Japan and its failure to provide appropriate financial assistance and/or compensation.

2.7 In this context, it is pointed out that it has remained the consistent position of the Canadian Government that any reparation to be paid to Canadian prisoners of war was provided for in the peace treaty with Japan. The authors reiterate that the peace treaty did not encompass the damages suffered by the Hong Kong veterans under the conditions of imprisonment imposed by the Japanese Government during the war and, more particularly, that the peace treaty did not address the question of indemnification for the gross violations of human rights and slave labour. It is further submitted that as a matter of law the Canadian Government had no legal authority or mandate to waive the veterans' rights to a remedy for the gross violations of their rights. In support of that argument, the authors refer to the Hague Convention of 18 October 1907, the Third Geneva Convention of 1949, Protocol I to the Geneva Conventions, and the legal commentaries prepared by the International Committee of the Red Cross, as well as to the study concerning the right to reparation for gross violations of human rights presented to the Subcommission on Prevention of Discrimination and Protection of Minorities by Mr. Theo van Boven, Special Rapporteur.

2.8 Upon their return to Canada, the authors continued to suffer from severe physical, mental and psychological problems as a direct consequence of the 44 months of imprisonment and slave labour imposed upon them by the Japanese. It is submitted that the Canadian authorities failed to recognize the nature and extent of the residual disabilities and incapacities suffered by them. A study undertaken by the Canadian Pension Commission in 1966 concluded that the health problems of Hong Kong veterans were a direct consequence of their sufferings in the internment camps. In 1968, the Committee to Survey the Work and Organization of the Canadian Pension Commission recognized that the Hong Kong veterans had not received adequate pensions and that their disabilities were constantly under-assessed. Amendments to the Pension Act and the prisoners of war legislation, in March 1971, improved benefits. However, the authors emphasize that those legislative provisions did not specifically refer to any form of compensation for the slave labour carried out by them, nor were those funds paid as indemnification for the violations of international law experienced by them. Moreover, the authors state that the residual effects of

their disabilities were not fully remedied by the statutory reforms, and they submit that at present they continue to be unable to obtain pension entitlement for a significant number of conditions suffered by them.

2.9 The authors indicate that, in 1987, the Hong Kong Veterans Association of Canada, in cooperation with the War Amputations of Canada submitted a claim to the United Nations Commission on Human Rights, in accordance with the procedure established by Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970, with respect to the gross violations of human rights committed by Japan in relation to the incarceration of Canadian servicemen held as prisoners of war. In 1991, the Subcommission on Prevention of Discrimination and Protection of Minorities concurred with the interpretation of its Working Group on Communications that "the procedure governed by Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970 could not be applied as a reparation or relief mechanism in respect of claims of compensation for human suffering or other losses which occurred during the Second World War".

2.10 The authors claim that they have exhausted all available domestic remedies and refer to the lengthy exchange of correspondence between representatives of the Hong Kong Veterans Association of Canada and the Canadian Government.

The complaint

3.1 The authors claim that the Canadian Government continues to deprive them of their right to a remedy, in violation of article 2, paragraph 3 (a), of the Covenant. In this context, they submit that the practical result of the failure of the Canadian Government to recognize that it had no legal authority to waive the authors' rights to compensation in the peace treaty with Japan, and its subsequent failure to support their claim against Japan in the appropriate international forums, has left them without an effective remedy for the gross violations of their human rights. It is submitted that the Government continues to support Japan's defence that the 1952 peace treaty effectively terminates Japan's legal responsibility to former prisoners of war and internees. In May 1991, the Canadian Prime Minister advised the Japanese Government that it remained Canada's position that the Japanese Government had satisfied its obligations regarding reparations as a consequence of the 1952 peace treaty. Moreover, the Prime Minister indicated that any consideration of compensation or reparation would be the responsibility of Canada. However, in response to requests by the Hong Kong Veterans Association, the Government has indicated that it is unwilling to consider further compensation.

3.2 The authors further claim that the Canadian Government's failure to provide them with proper financial assistance and compensation during the many years following the war and the pension deficiencies still being suffered to the present day constitute a violation of article 26 of the Covenant. They contend that they did not receive appropriate entitlement and/or were under-assessed for their specific disabilities in comparison with other Canadian veterans who returned from the war.

3.3 The authors emphasize that the actions and failures of the Canadian Government described above, although occurring before the entry into force of the Covenant and the Optional Protocol, have continuing effects which in themselves constitute a violation of the Covenant. In this context, it is argued that the authors continue to suffer from physical and mental defects caused by their experiences in the Japanese camps. To support that argument, reference is made to a report by Gustave Gingras on "The sequelae of inhuman conditions and slave labour experienced by members of the Canadian components of

the Hong Kong forces, 1941-1945, while prisoners of the Japanese Government". The authors submit that the continuing and ongoing effects of the violations suffered by them constitute in themselves a violation of the Covenant on and after 19 August 1976, the date of entry into force of the Covenant and the Optional Protocol for Canada. In this context, the authors refer to decisions of the Human Rights Committee in communications No. 123/1982 (Manera v. Uruguay),[5] No. 196/1985 (Gueye v. France),[6] No. 6/1977 (Sequeira v. Uruguay)[4] and No. R.6/24 (Lovelace v. Canada).[7]

Additional information provided by the authors

4.1 On 10 February 1994, the Committee's Special Rapporteur on new communications requested the authors, under rule 91 of the Committee's rules of procedure, to furnish additional information with regard to their claim that they did not receive appropriate pension entitlements compared to other Canadian veterans.

4.2 By submission, dated 25 March 1994, the authors state that they are victims of discrimination since they cannot qualify for additional benefits (the Exceptional Incapacity Allowance, the Veterans Independence Program, and the additional primary disability or consequential disability pensions available under the Pension Act) that are available to other veterans because of the different legal basis of their prisoner of war pensions.

4.3 In this context, they explain that the Exceptional Incapacity Allowance, which is granted to veterans who suffer from extraordinary incapacity, is only available for persons who have a full pension under the Pension Act. Since the Veterans Pension Act does not recognize the Hong Kong veterans prisoner of war benefit as a form of pension for the purpose of the Exceptional Incapacity Allowance, the Hong Kong veterans cannot qualify, although the majority would meet the other requirements for the allowance.

4.4 The Veterans Independence Program, which allows veterans to remain self-sufficient by providing certain services, bases the applicability of the programme on a "war-related pensioned condition". Since the Canadian Government does not recognize the situation of the Hong Kong veterans as such a condition, they are excluded from benefiting from the programme, notwithstanding the fact that the Hong Kong veterans prisoner of war benefit was intended to reflect a form of pension directly related to their wartime experience.

4.5 As to additional pensions available under the Pension Act, it is submitted that the Canadian Pension Commission is not prepared to grant entitlement for many of the particular pension applications from Hong Kong veterans. That refusal is based on the premise that the Hong Kong veterans have received pension entitlement as part and parcel of their prisoner of war benefit.

4.6 It is further argued that the legislation relating to prisoner of war compensation benefits is in itself discriminatory, since the basis for the compensation is directly related to the period of time spent as a prisoner of war, without taking into account the nature of the prisoner of war experience (the gross violations of human rights suffered by the Hong Kong veterans).

4.7 It is finally argued that the authors are victims of discrimination because of Canada's policy of selective support as to the question of reparations arising from the Second World War. In this connection, it is submitted that the Canadian Government has actively supported the payment of reparations by the Federal Republic of Germany to victims of gross human rights violations

committed by Nazi Germany but has failed to provide similar support for claims by the victims of human rights violations by Japan. In this context, the authors also refer to compensatory payments by the Canadian Government to Japanese Canadians, who during the war had been interned, deported or deprived of their property solely because of their ancestry.

The State party's observations on admissibility and authors' comments thereon

5.1 By submission of 21 September 1994, the State party addresses the question of the admissibility of the communication and provides background information on the overall scheme of veterans compensation in Canada.

5.2 Pursuant to the Canadian Pension Act, a wide variety of benefits are available to war veterans. Those benefits are exempt from taxation and are in addition to income received from employment or other sources. The State party distinguishes the following benefits.

5.3 Disability pensions are awarded for specific disabilities resulting from military service. The amount is related to the extent of the veteran's disabilities. Of the 547 former prisoners of war who were incarcerated by the Japanese for more than a year (encompassing all Hong Kong veterans), 180 receive a full pension and 91 receive a half pension; the remaining former prisoners receive amounts in between. In May 1991, all Hong Kong veterans were automatically assessed at a minimum of one half of the disability pension for the condition of avitaminosis.

5.4 In 1971, all former prisoners of war of the Japanese who had been held captive for one year or more, including all Hong Kong veterans, and who had an assessable disability were given prisoner of war compensation equivalent to one half of the disability pension. However, no additional prisoner of war compensation was given to those who already received a disability pension of 50 per cent or more. In 1976, the legal basis for the prisoner of war compensation was changed, the requirement of assessable disability was eliminated and prisoner of war compensation was provided to former prisoners of all enemy Powers of the Second World War. However, substantially higher rates were maintained for former prisoners of Japan in light of the particular hardships they suffered. As a result, Hong Kong veterans were entitled to a 50 per cent prisoner of war compensation, whereas former prisoners of war of European countries received from 10 per cent to 20 per cent, depending on the length of their incarceration. Furthermore, the prisoner of war compensation was granted in addition to any disability pension, up to the equivalent of a full disability pension. In 1986, that ceiling was removed and prisoner of war compensations are now being paid regardless of the percentage of the disability pension received. That means that the least disabled Hong Kong veterans receive the equivalent of a full disability pension (one half automatic disability pension and one half prisoner of war compensation), and the most severely disabled Hong Kong veterans receive a 150 per cent disability pension.

5.5 A veteran who receives the maximum war disability pension may also be awarded an additional Exceptional Incapacity Allowance. The State party points out that 105 former prisoners of war of the Japanese receive such an allowance.

5.6 A pensioned veteran who is totally disabled and requires an attendant qualifies for an additional Attendance Allowance. The State party submits that 172 prisoners of war of the Japanese receive that allowance.

5.7 The Veterans Independence Program pays for home support services for pensioned veterans, such as housekeeping and "meals on wheels". Entitlement to that programme is based on the nature of the disability and the needs of the veteran.

5.8 The War Veterans Allowance is an income-tied allowance aimed at assisting Canadian veterans who are incapable of maintaining themselves economically. Because of their other pension entitlements, Hong Kong veterans are precluded from qualifying for that allowance.

5.9 Further benefits for pensioned veterans include supplemental health benefits, clothing allowances and counselling.

5.10 Following the confiscation of Japanese assets in Canada, pursuant to the 1952 peace treaty, the Hong Kong veterans received a lump sum compensation of $1.50 per day of incarceration in recognition of the undue hardship suffered.

6.1 The State party notes that the three authors claim to act on behalf of all Hong Kong veterans, but that they have not identified the remaining members of the group, nor have they demonstrated their authority to act on behalf of those other members. The State party recalls that a communication must be submitted by the individual alleging to be a victim or by a duly authorized representative, and it refers to the Committee's jurisprudence in that regard. The State party therefore argues that to the extent that the communication is filed on behalf of all Hong Kong veterans, it is inadmissible because the authors have no authority to act.

6.2 As regards the authors' claim that the Canadian Government waived their right to a remedy and that they were inadequately indemnified under the 1952 peace treaty, in violation of article 2, paragraph 3 (a), of the Covenant, the State party submits that the compensation received by the authors pursuant to the peace treaty did not amount to a violation of any individual human right or freedom but represented a portion of the compensation for their suffering. The State party recalls that there is no autonomous right to compensation under the Covenant and refers to the Committee's jurisprudence with respect to communications Nos. 275/1988 and 343, 344 and 345/1988. The State party argues therefore that that part of the communication is inadmissible as incompatible ratione materiae. In this context, the State party denies that it waived the authors' right to a remedy by entering into the 1952 peace treaty with Japan, and states that the peace treaty actually facilitated the availability of an expeditious remedy for the authors.

6.3 Further, the State party argues that the authors' claim relating to the 1952 peace treaty is inadmissible ratione temporis. Reference is made to the Committee's jurisprudence that it is not competent to examine allegations relating to events which took place before the entry into force of the Covenant and the Optional Protocol, unless the alleged violation continues or has effects which themselves constitute a violation after the date of entry into force. The State party points out that the mistreatment suffered by the authors took place between 1941 and 1945 at the hands of the Japanese and that that mistreatment is not in any way continuing. The 1952 peace treaty, on which the authors base their claim, was also concluded before the entry into force of the Covenant and the Optional Protocol. The State party submits that an argument of inadequate compensation cannot turn those past events into a continuing violation for the purposes of the Covenant. The State party states that the jurisprudence cited by the authors (No. 123/1982 (Manera v. Uruguay), No. 196/1985 (Gueye v. France), No. 6/1977 (Sequeira v. Uruguay) and No. R.6/24 (Lovelace v. Canada))

does not support their claim, since the first two cases concerned violations resulting from the continued application of a law and the other two cases only reinforce the argument that the Committee can only examine violations occurring after the entry into force.

6.4 With regard to the authors' claim that they are discriminated against because prisoner of war compensation is not treated as part of their disability pension and that they are therefore not eligible for additional benefits such as exceptional incapacity or attendance allowances, the State party refers to the Committee's interpretation of article 26 of the Covenant and states that the authors must submit sufficient evidence in substantiation of their allegation to show a prima facie case. According to the State party, they would have to show that a distinction is made which impairs the enjoyment of their rights and freedoms on an equal footing with other persons, that that distinction is not reasonable or objective and that the aim of the distinction is illegitimate under the Covenant. The State party points out that prisoner of war compensation is available to all former prisoners of war, not just to Hong Kong veterans, and that no recipient may treat it as part of a disability pension. The State party argues, therefore, that the authors have not demonstrated a distinction which adversely affects the Hong Kong veterans, nor have they demonstrated that the basis on which each veteran benefit programme is allocated is unreasonable or illegitimate. The State party argues that the criteria used for the allocation of benefits (as set out above) are not discriminatory and fully comply with the Covenant. Moreover, the State party points out that the authors have not identified specific disabilities for which they are not compensated, nor have they outlined the benefits they personally receive from the Government's veterans programmes. As regards the authors' other allegations of discrimination regarding payments of Japanese Canadians interned in Canada during the Second World War and regarding the position of Canadians with claims against Germany, the State party submits that those situations are materially different from the authors' and therefore irrelevant. The State party concludes that the authors have failed to substantiate, for purposes of admissibility, their claim that they are victims of discrimination, in violation of article 26 of the Covenant.

6.5 Moreover, the State party argues that the authors have failed to exhaust all domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol. In this connection, the State party points out that the right to equality before and under the law and the right not to be discriminated against are protected by the Canadian Charter of Rights and Freedoms, which was entrenched as part of Canada's Constitution in 1982. Pursuant to section 24 of the Charter, anyone whose rights and freedoms, as guaranteed by the Charter, have been infringed or denied may apply to the court in order to obtain a remedy. Accordingly, it is open to the authors to commence an action in the Federal Court to obtain a remedy for the alleged discrimination against them.

6.6 Furthermore, veterans may dispute the nature and extent of their entitlement before the Canadian Pension Commission, an independent quasi-judicial federal agency which is responsible for the initial adjudication of both entitlement and assessment claims. From the Commission's decisions, appeal is open to the Veterans Appeal Board, whose decisions are subject to review by the Federal Court-Trial Division and, with leave, to the Federal Court-Appeal Division, whose decisions may be appealed, with leave, to the Supreme Court of Canada. In this context, the State party submits that all claimants are entitled to free legal assistance for applications or appeals made to either the Canadian Pension Commission or the Veterans Appeal Board.

7.1 In their comments on the State party's submission, the authors reiterate that for 30 years they received totally inadequate pensions and that a significant element of discrimination remains today in the application of the Veterans Pension Act to Hong Kong veterans when compared to the pension treatment of other severely disabled veterans. In this context, the authors note that only a small percentage (20 to 30 per cent) of Hong Kong veterans have actually qualified for special allowances such as the Exceptional Incapacity Allowance and the Attendance Allowance. They claim that the majority of Hong Kong veterans would have received those forms of allowance many years ago save and except for the discriminatory aspects of the current Pension Act, which distinguishes between the prisoner of war allowance which all Hong Kong veterans receive and the disability pension. Furthermore, it is submitted that the Government does not recognize the prisoner of war benefit in relation to the concept of "war related pension condition" when assessing eligibility for the Veterans Independence Program.

7.2 The authors reiterate that the State party had no right to waive the rights of the Hong Kong veterans through the 1952 peace treaty. It is argued that that breach has the continuing and ongoing effect of depriving the Hong Kong veterans of the specific right to a remedy for the gross violations committed against them by the Japanese.

7.3 As regards their standing, the authors submit that the Hong Kong Veterans Association has passed and ratified resolutions authorizing the authors to act on their behalf in relation to the present communications.

7.4 The authors further state that their communication alleges a violation of article 26 in conjunction with article 2, paragraph 3 (a), of the Covenant, and is therefore not solely based on article 2, paragraph 3.

7.5 As regards the State party's argument that the communication is inadmissible ratione temporis, the authors state that the State party's actions - entering into the 1952 peace treaty with Japan, its subsequent failure to provide appropriate financial assistance, its refusal to support the claim of the Hong Kong veterans against Japan - have resulted in a continuing and ongoing violation of their right to a remedy pursuant to article 2, paragraph 3 (a) of the Covenant and has amounted to a form of discrimination in violation of article 26. In this context, the authors refer to the severe residual disabilities and incapacities suffered by the Hong Kong veterans to the present day. Furthermore, Canada's refusal to support their claim in international forums and its maintenance of discriminatory legislation in regard to the Hong Kong veterans pension rights are said to reflect a continuing and ongoing violation of the Covenant.

7.6 As regards the State party's argument that all prisoners of war are similarly treated and that there is therefore no discrimination, the authors state that the appropriate standard for analysis relates to the difference in treatment between Canadian prisoners of war and other severely disabled veterans. It is stated that the discrimination, described in detail in the authors' original submission, affects the Hong Kong veterans particularly because of the severe residual disabilities and incapacities suffered, as a consequence of which they would have qualified for the special allowances if it were not for discriminatory provisions excluding them. In this context, the authors refer to the detailed medical history relevant to the Hong Kong veterans' residual disabilities and incapacities which they submitted with their original communication.

7.7 As regards the exhaustion of domestic remedies, the authors state that for 50 years they have pursued without success a remedy in relation to their claim, and that they have petitioned the Government on numerous occasions in order to obtain legislative reform, all to no avail. The authors therefore argue that the application of domestic remedies in their case has been unreasonably prolonged. Moreover, the authors note that their claim involves the application of international legal principles over which the Canadian courts have no authority to rule. Furthermore, the authors note that the Canadian Pension Commission and the Veterans Appeal Board have no authority to remove the discriminatory aspects of the legislation. The authors therefore conclude that, for all practical purposes, they have exhausted domestic remedies.

Issues and proceedings before the Committee

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 Part of the authors' communication relates to the alleged waiver of their right to compensation by Canada through the 1952 peace treaty with Japan. In this connection, the Committee observes that the alleged failure by Canada to protect the authors' right to obtain compensation from Japan cannot be seen ratione materiae as a violation of a Covenant right. Further, the Committee recalls its established jurisprudence that it is precluded from examining a communication when the alleged violations occurred before the entry into force of the Covenant.[f] In the present case, the authors have not shown how any of the acts done by Canada in affirmation of the peace treaty after the entry into force of the Covenant could entail continuing effects which in themselves would constitute violations of the Covenant by Canada. That part of the authors' communication is therefore inadmissible.

8.3 The authors further claim that they are victims of discrimination because their prisoner of war pension is not counted as a disability pension and does not entitle them to supplementary allowances available only to persons receiving a full disability pension. The State party has indicated that the authors have not exhausted domestic remedies available to them in relation to their complaint of discrimination, in particular that they have not tried to obtain a remedy under the Canadian Charter of Rights and Freedoms. The authors have stated that, for the past 50 years, they have pursued domestic remedies through political channels. The authors, however, have failed to indicate what concrete steps they have taken to challenge the alleged discrimination against them before the Canadian courts, as would be possible under the Canadian Charter. The Committee concludes therefore that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol. In the circumstances, the Committee need not address other admissibility criteria, such as whether the authors have substantiated their claim for purposes of article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the State party, to the authors and to the authors' counsel.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] See E/CN.4/1992/2-E/CN.4/Sub.2/1991/65, chap. II.B, decision 1991/104.

[b] Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40 (A/39/40), annex XII, views adopted on 6 April 1984.

[c] Ibid., Forty-fourth Session, Supplement No. 40 (A/44/40), annex X.B, views adopted on 3 April 1989.

[d] Ibid., Thirty-fifth Session, Supplement No. 40 (A/35/40), annex IX, views adopted on 29 July 1980.

[e] Ibid., Thirty-sixth Session, Supplement No. 40 (A/36/40), annex XVIII, views adopted on 30 July 1981.

[f] Ibid., Forty-fifth Session, Supplement No. 40 (A/45/40), vol. II, annex X.J, communication No. 275/1988 (S.E. v. Argentina) and annex X.R, communications Nos. 343, 344 and 345/1988 (R.A.V.N. et al. v. Argentina), decisions of 26 March 1980, declaring the communications inadmissible.

D. Communication No. 584/1994, Antonius Valentijn v. France (decision adopted on 22 July 1996, fifty-seventh session)*

Submitted by: Antonius Valentijn

Victim: The author

State party: France

Date of communication: 11 October 1993 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 July 1996,

Adopts the following decision on admissibility.

1. The author of the communication is Antonius Valentijn, a citizen of the Netherlands born in 1940, currently detained at the penitentiary of Bapaume in France. He claims to be a victim of violations by France of articles 2; 3; 9, paragraph 1; 14, paragraphs 1, 2 and 3; and 15, paragraph 1, of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 On 15 August 1986, the author and two other persons were arrested at sea, after officers of the French Customs Office had detected 639 kilograms of drugs on their sailboat; at the moment of the inspection and arrest, they were sailing in the English Channel.

2.2 On 19 August 1986, the author was charged with violations of the French legislation on illicit drugs by the examining magistrate of the Tribunal of Boulogne-sur-Mer and placed under preventive detention. Charges against the author were based on reports (procès-verbaux) drawn up by French customs officers within the meaning of article 336, paragraph 1, of the Customs Code (Code des Douanes). The provision stipulates that customs reports which have been prepared by two customs officers or two officers of any other administrative unit are deemed to constitute evidence against an individual, unless the individual files a claim that the recordings were later falsified (inscription de faux de constatations matérielles).

2.3 During the preliminary hearing, the author and his co-accused denied that the inspection of the boat had taken place within French territorial waters and contended that they had been arrested on the high seas, in international waters. A maritime expert who was commissioned by the author to investigate the matter concluded in his report that "it was not possible to prove that the inspection of the sailboat took place in French waters, and that all indicators supported the opposite conclusion".

2.4 On 24 October 1986, the examining magistrate appointed another expert who, in his report dated 12 February 1987, confirmed that the inspection had indeed taken place within French territorial waters. On 30 April 1987, the examining

* Pursuant to rule 85 of the rules of procedure, Committee member Christine Chanet did not participate in the examination of the communication.

magistrate issued an order referring the case to the Tribunal (Tribunal de Grande Instance) of Boulogne-sur-Mer.

2.5 The author's case and that of his co-defendants was heard on 17 June 1987; by judgement of the same day, the Tribunal of Boulogne-sur-Mer decided to suspend the proceedings temporarily on the ground that the author had indicated, during the hearing, that he wanted to institute proceedings contesting the validity of the reports prepared by the customs officers on or immediately after 15 August 1986. The Tribunal ordered the continued detention of the three accused because it considered that there was a risk that they would escape and that it was necessary to protect public order and to prevent the recurrence of the offence. It then decided to take up the case again in a hearing scheduled for 16 December 1987.

Proceedings in respect of the author's criminal case

2.6 At hearings held on 16 December 1987, 16 March, 22 June, 17 August, 12 October 1988 and 11 January 1989, the court, upon examining the case, decided once again to suspend the proceedings temporarily, as the proceedings concerning the author's claim of falsification of the customs reports were still pending. After each hearing, a date was set for the next hearing. By decisions of the same dates, the court ordered the continued detention of the author and his co-accused. Appeals against those decisions were dismissed by the Court of Appeal of Douai on 9 September and 29 December 1987 and 5 April and 25 August 1988. The Court of Cassation dismissed further appeals on 5 July and 7 December 1988 and 30 January 1989.

2.7 On 1 March 1989, the author was found guilty of infraction of the French legislation on illicit drugs and of smuggling prohibited drugs, offences covered by the Code on Public Health and the French Customs Code, respectively. He was sentenced to 10 years' imprisonment and the payment of a customs penalty. On 29 June 1989, the Court of Appeal of Douai sentenced the author to 12 years' imprisonment. It confirmed the customs penalty aspects of the judgement of first instance. On 5 October 1990, the Court of Appeal rejected the author's request for release. His appeal against the decision of 29 June 1989 was dismissed by the Court of Cassation on 17 December 1990.

Proceedings in respect of the forgery claim

2.8 On 19 June 1987, the author filed his arguments in respect of the forgery proceedings. Preliminary investigations into the matter were initiated on 26 June 1987, and the author joined the proceedings as a civil party on 7 October 1987. On 15 January 1988, the examining magistrate appointed an expert who confirmed, in a report dated 29 February 1988, that the inspection and seizure of the boat had taken place in French territorial waters.

2.9 By order of 7 March 1988, the examining magistrate rejected the author's request for a counter-expertise, considering that the request amounted to dilatory tactics. An appeal against the latter decision was declared inadmissible by the Indictment Chamber of the Court of Appeal on 16 March 1988.

2.10 On 31 March 1988, the examining magistrate issued an order dismissing the forgery proceedings (Ordonnance de non-lieu dans la procédure d'inscription de faux et usage de faux en écritures publiques). The Court of Appeal of Douai confirmed the decision on 26 April 1988; it further dismissed the author's request for supplementary information (supplément d'information) or an(other) expertise, indicating that in the light of the expertise submitted in the

criminal proceedings against the author, there was insufficient evidence to sustain the falsification claim. The author's appeal against the latter decision was declared inadmissible by the Court of Cassation on 28 November 1988. It concluded that the Indictment Chamber of the Court of Appeal, having examined the facts, had properly assessed all the elements of the file and had decided in the light of all the available evidence.

2.11 On 8 November 1989, the European Commission of Human Rights declared inadmissible as "manifestly ill-founded" the author's complaint relating to the length of his provisional detention (défaut manifeste de fondement). On 10 June 1991, the author filed another complaint with the European Commission, which was registered as case No. 18563/91. In the new complaint, the author argued: (a) that he had been unlawfully arrested; (b) that he had not been tried within a reasonable period of time; (c) that his right to be presumed innocent until proven guilty according to law had been violated (argument related to the customs reports); and (d) that his right to obtain the attendance and examination of the maritime expert as a witness on his behalf had been violated.

2.12 On 5 May 1993, the European Commission of Human Rights declared case No. 18563/91 inadmissible, invoking different grounds. With respect to the claim of unlawful arrest, it noted that the final decision in the relevant judicial proceedings in respect of that claim, i.e., the forgery proceedings, had been delivered more than six months before the author had filed his case with the Commission. That part of the case was declared inadmissible ratione temporis. The claims about undue prolongation of the proceedings and the violation of the presumption of innocence were dismissed as unsubstantiated. Concerning the alleged denial of the right to have a witness examined on the author's behalf, the Commission concluded that, as the author had failed to raise that issue before the Court of Cassation, domestic remedies had not been exhausted.

2.13 By letter dated 3 January 1994, the author notes that he has filed two further complaints with the European Commission of Human Rights and that those complaints have been registered.[a] He points out that the issue of his allegedly unlawful arrest cannot be considered by the European Commission because of the six months rule. He reaffirms that he was arrested in international waters and that the customs officers falsified all documents, including the logbook and the radio journal. He reiterates that his trial was unfair, as he was not allowed to have an expert witness called on his behalf.

2.14 On 14 August 1994, the author noted that although the maximum prison term for the offences he was found guilty of, and initially sentenced to, was 10 years, the Court of Appeal of Douai sentenced him to 12 years. He indicates that, in 1993, a new criminal code entered into force in France, under which the maximum prison term for each of those offences is also 10 years.[b] In the same context, the author notes that, on 6 July 1994, the Court of Appeal of Douai rejected his complaint about a violation of article 15 of the Covenant and of article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (which corresponds to article 15). He notes that, on the basis of previous experience, an appeal to the Court of Cassation would be futile and ineffective.

The complaint

3. The facts as outlined above are said to amount to violations of articles 2; 3; 9, paragraph 1; 14, paragraphs 1, 2, 3 (c) and (e); and 15, paragraph 1, of the Covenant.

The State party's information and observations on admissibility

4.1 In its submission under rule 91 of the rules of procedure, the State party, after providing a detailed account of the factual situation as well as a chronology of the judicial proceedings in the case, contends that the communication is inadmissible on the basis of articles 3 and 5, paragraphs 2 (a) and (b), of the Optional Protocol.

4.2 With respect to the alleged violation of article 9, paragraph 1, of the Covenant, because of the presumed unlawful apprehension of Mr. Valentijn outside French territorial waters, the State party notes that the issue of whether the author's arrest took place inside or outside territorial waters is a question of fact, which was evaluated by the local courts in public hearings and on the basis of two reports prepared by court-appointed experts as well as the arguments and counter-expertise produced by Mr. Valentijn. In this respect, accordingly, the State party concludes that the Committee has no competence ratione materiae to challenge evidence which was assessed in a sovereign manner by the domestic courts, in strict accordance with applicable procedure(s).

4.3 As to the alleged violation of article 14, paragraph 1, of the Covenant, the State party first observes that the author has failed to substantiate that allegation. Subsidiarily, it emphasizes that all the allegations pertaining to article 14 had been examined by the European Commission of Human Rights in the first complaint submitted by the author to that body. That complaint, alleging a violation of article 6, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the equivalent of article 14 of the Covenant), was declared inadmissible on 8 November 1988 on the basis of non-exhaustion of domestic remedies.[c] The State party recalls its reservation to article 5, paragraph 2 (a), of the Optional Protocol, according to which "[t]he Human Rights Committee shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement".[d] That reservation is said to apply to the author's claim under article 14, paragraph 1, before the Committee, thereby excluding the Committee's competence.

4.4 Similar considerations apply, in the State party's opinion, to the author's claim under article 14, paragraph 2, of the Covenant. Indeed, in his case No. 18563/91 placed before the European Commission of Human Rights, Mr. Valentijn had invoked article 6, paragraph 2, of the European Convention (the equivalent of article 14, paragraph 2, of the Covenant), on the basis that article 336 (1) of the French Customs Code was incompatible with the presumption of innocence. That complaint was declared inadmissible as manifestly ill-founded by the European Commission on 5 May 1993. Accordingly, that allegation is equally covered by the French reservation to article 5, paragraph 2 (a), thereby excluding the Committee's competence.

4.5 As to the alleged violation of article 14, paragraphs 3 (c) and (e), of the Covenant, the State party notes that claims of undue delays in the proceedings and of failure to hear a defence witness had been raised by the author in his case No. 18563/91 placed before the European Commission. On 5 May 1993, the

European Commission declared the claim related to the excessive length of the proceedings inadmissible as manifestly ill-founded, and the claim pertaining to the alleged failure to hear a defence witness inadmissible for non-exhaustion of domestic remedies. Accordingly, the French reservation to article 5, paragraph 2 (a), is said to apply.

4.6 Finally, with respect to the claim under article 15 of the Covenant, the State party argues that the author has failed to exhaust available domestic remedies. It notes that while the confirmation and aggravation of the author's initial sentence by the Court of Appeal of Douai (29 June 1989) was appealed to the Court of Cassation, it was not argued before the Court of Cassation that the aggravation of the sentence constituted a retroactive imposition of a heavier sentence. The State party contends that it was incumbent upon the author to raise that issue before the Court of Cassation, all the more so considering that the principles enshrined in article 15 of the Covenant have constitutional rank in the French legal system. That the author failed to place that grievance before the domestic courts renders it inadmissible on the basis of non-exhaustion of domestic remedies.

Issues and proceedings before the Committee

5.1 Before considering any claims contained in a communication, the Human Rights Committee must consider, in accordance with rule 87 of its rules of procedure, whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 With regard to the author's claims under article 14, paragraphs 1, 2 and 3 (c) and (e), of the Covenant, the Committee notes that the author's successive complaints submitted to the European Commission of Human Rights were based on the same events and facts as the complaint he submitted under the Optional Protocol. It recalls that in respect of article 5, paragraph 2 (a), of the Optional Protocol, France entered the following reservation upon ratification: "[T]he Human Rights Committee shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement" ("Le Comité ne sera pas compétent pour examiner une communication émanant d'un particulier si la même question est en cours d'examen ou a déjà été examinée par une autre instance internationale d'enquête ou de règlement"). In the instant case, the Committee is seized of the "same matter" as the European Commission was. As to whether the European Commission "examined" the same matter, the Committee observes that most of the author's claims under article 14, with the exception of that under article 14, paragraph 3 (e), were declared inadmissible as manifestly ill-founded. In that respect, the Committee concludes that the European Commission "examined" the author's allegations and that the French reservation to article 5, paragraph 2 (a), of the Optional Protocol applies. In respect of the author's claim under article 14, paragraph 3 (e), which was declared inadmissible on the basis of non-exhaustion of domestic remedies by the European Commission, the Committee notes that since the author failed to invoke, before the Court of Cassation, any issue relating to that provision of the Covenant, the Committee would also have to conclude that the requirements of article 5, paragraph 2 (b), of the Optional Protocol, have not been met.

5.3 Concerning the claim under article 9, paragraph 1, of the Covenant, the Committee notes that the question of whether the author was arrested within or outside French territorial waters was carefully examined by the tribunals seized of the case, which evaluated it on the basis of two expert reports requested by

the tribunals, as well as the expertise commissioned by the author himself. The claim, accordingly, relates to the evaluation of facts and evidence in the case, as has been observed by the State party itself. The Committee recalls that it is generally for domestic courts to assess facts and evidence in a particular case and for appellate courts of States parties to review the assessment of such evidence by the lower courts. It is not for the Committee to question the evaluation of the evidence by the domestic courts unless that evaluation was manifestly arbitrary or amounted to a denial of justice. There is no evidence in the material before the Committee that the procedure before the courts suffered from such defects. Accordingly, the author has failed to substantiate, for purposes of admissibility, his allegation, and that claim is inadmissible under article 2 of the Optional Protocol.

5.4 In respect of the author's claim under article 15, which had not been submitted to the European Commission of Human Rights, the Committee notes that the author was found guilty of a number of offences under the French Code of Public Health as well as under the Customs Code. Before the Court of Cassation, in particular, the author did not, however, invoke the essence of the right protected by article 15 of the Covenant; accordingly, the highest domestic tribunal never was confronted with the author's argument that he should have been given a lighter sentence after the amendment of the Criminal Code in 1993. In this respect, therefore, the author did not exhaust available domestic remedies within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraphs 2 (a) and (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author of the communication.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] The author does not specify the contents of the two new cases.

[b] The author fails to understand that the 12-year prison sentence is a cumulative one. Under the new criminal code, the offences for which the author was convicted are: (a) unauthorized transport of illicit drugs (sentence: up to 10 years' imprisonment and a maximum fine of 50 million French francs), and (b) unauthorized import of illicit drugs (maximum sentence: 10 years' imprisonment and a maximum fine of 50 million French francs).

[c] Decision of 8 November 1988 on case No. 14033/88 (copy kept in the case file).

[d] See Multilateral treaties deposited with the Secretary-General, part I, chap. IV.5 (United Nations publication, Sales No. E.96.V.5).

E. Communication No. 608/1995, Franz Nahlik v. Austria (decision adopted on 22 July 1996, fifty-seventh session)*

Submitted by: Franz Nahlik

Victim: The author

State party: Austria

Date of communication: 24 February 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 July 1996,

Adopts the following decision on admissibility.

1. The author of the communication is Franz Nahlik, an Austrian citizen, residing in Elsbethen, Austria. He submits the communication on his own behalf and on behalf of 27 former colleagues. They claim to be victims of a violation by Austria of article 26 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author worked at the Social Insurance Board in Salzburg (Salzburger Gebietskrankenkasse) and retired before 1 January 1992. He states that he and his 27 former colleagues receive retirement benefits under the relevant schemes of the Regulations of Service for Employees of the Social Insurance Board. As of 1 January, a collective agreement between the Social Insurance Board in Salzburg and the employees modified the scheme; the agreement provided for a linear pay raise of 4 per cent starting on 1 January 1992 and a permanent monthly entitlement of 200 schillings, which is regarded as a regular payment to be included in the calculation of employees' retirement benefits. The Salzburg Regional Insurance Board took the position that only active employees, but not employees retired before 1 January 1992, should receive that entitlement.

2.2 The authors, represented by counsel, filed a lawsuit against the Board with the Salzburg Federal District Court sitting in labour and social matters (Landesgericht Salzburg als Arbeits-und Sozialgericht), which was dismissed on 21 December 1992. In the opinion of the Court, the parties to a collective agreement are free under federal labour law to include provisions stipulating different pension computation treatment of active and retired employees or even norms creating conditions to the disadvantage of retirees. The authors then appealed to the Federal Court of Appeal in Linz (Oberlandesgericht in Linz), which confirmed the District Court's judgement on 11 May 1993. Subsequently, the Supreme Court (Oberster Gerichtshof) dismissed the authors' appeal on 22 September 1993. It considered that although the sum of 200 schillings was part of the authors' permanent income (ständiger Bezug), only part of the income would be considered as monthly salary (Gehalt), which is the basis for determining the level of retirement benefits to be paid. Moreover, since that was stipulated in the collective agreement, a different pension treatment of the income of active and retired employees was permissible.

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* The text of an individual opinion of five Committee members is appended.

The complaint

3.1 The author claims that the Republic of Austria violated the retirees' rights to equality before the law and to equal protection of the law without any discrimination. In particular, he states that the different treatment between active and retired employees and between pre-January 1992 retirees and post-January 1992 retirees was not based on reasonable and objective criteria, as the groups of persons concerned find themselves in a comparable situation with regard to their income and they face the very same economic and social conditions. It is further argued that the different treatment was arbitrary in that it did not pursue any legitimate aim and that the discretionary power of the drafters of the collective agreement, approved by the Austrian courts, violates the general principle of equal treatment under labour law.

3.2 It is stated that the matter has not been submitted to another procedure of international investigation or settlement.

The State party's observations and the author's comments thereon

4. By submission of 18 September 1995, the State party acknowledges that domestic remedies have been exhausted. It argues, however, that the communication is inadmissible because the author challenges a regulation in a collective agreement over which the State party has no influence. The State party explains that collective agreements are contracts based on private law and exclusively within the discretion of the contracting parties. The State party concludes that the communication is therefore inadmissible under article 1 of the Optional Protocol, since one cannot speak of a violation by a State party.

5.1 In his comments of 19 November 1995, the author explains that he does not request the Committee to review in abstracto a collective agreement, but rather to examine whether the State party, and in particular the courts, failed to give proper protection against discrimination and thereby violated article 26 of the Covenant. The author contends therefore that the violation of which he claims to be a victim is indeed attributable to the State party.

5.2 As regards the State party's claim that it had no influence over the contents of the collective agreement, the author explains that the collective agreement in the present case is a special type of agreement and qualifies as a legislative decree under Austrian law. Negotiated and concluded by public professional organizations established by law, the procedures and contents of collective agreements are set forth in federal laws, which stipulate what a collective agreement may regulate. Further, federal courts are entrusted with a full judicial review of the agreements. In order to enter into force, the collective agreement (and its eventual amendments) have to be confirmed by the Federal Minister for Labour and Social Affairs. The agreement is then published in the same manner as legislative decrees of federal and local administrative authorities.

5.3 The author therefore contests the State party's assertion that it had no influence over the contents of the collective agreement, and claims instead that the State party controls the conclusion of collective agreements and their execution on the legislative, administrative and judicial levels. The author notes that the State party has enacted legislation and delegated certain powers to autonomous organs. He observes however that article 26 of the Covenant prohibits discrimination "in law or in practice in any field regulated and protected by public authorities".[3] The author concludes that the State party was thus under obligation to comply with article 26 and failed to do so.

6.1 In a further submission, dated May 1996, the State party explains that the amended collective agreement provides for a monthly bonus of 200 schillings to employees of Austrian social security institutions. The bonus is not taken into account when assessing pensions to which the recipients became entitled before 1 January 1992. In legal terms, the question is whether or not the bonus is a so-called "permanent emolument" (ständiger Bezug) to which not only employees but also pensioners are entitled. The State party submits that the issue has been examined by the Courts which concluded that the payment is not a permanent emolument and that therefore pensioners are not entitled to it.

6.2 The State party further submits that active employees and pensioners are two different classes of persons who may be treated differently with respect to the entitlement to the monthly bonus.

6.3 The State party reiterates that since a collective agreement is a contract under private law, which is concluded outside the sphere of influence of the State, article 26 of the Covenant is not applicable to the provisions of the collective agreement. As regards the courts, the State party explains that they determine disputes on the basis of the collective agreement, interpreting the text as well as the intentions of the parties. In the instant case, the exclusion of pensioners from the monthly bonus was precisely the intention of the parties. Further, the State party explains that collective agreements are not legislative decrees and the courts had therefore no possibility of challenging the agreement before the Constitutional Court.

6.4 The State party maintains its position that the communication is inadmissible under article 1 of the Optional Protocol.

7.1 In his comments, the author notes that the State party's observations relate mainly to the merits of his complaint and are irrelevant for admissibility.

7.2 As regards the State party's statement that the collective agreement is a contract under private law, the author refers to his previous submissions, which show the active involvement of the Government in the collective agreement covering the staff of the Austrian social security institutions, which are institutions of public law.

7.3 As regards the State party's argument that active and retired employees are two different classes of persons, the author points out that his complaint relates to the difference in treatment between employees who retired before 1 January 1992, and those who retired after 1 January 1992. He emphasizes that the regular payment of 200 schillings is not taken into account when determining the pension of those who retired before 1 January 1992, whereas it is taken into account in the determination of the pensions of those who retired after 1 January 1992. He claims that that constitutes discrimination based on age.

7.4 The author reiterates that, under the Covenant, the courts are obliged to provide effective protection against discrimination and therefore should have overruled the provision in the collective agreement discriminating among pensioners on the ground of the date of their retirement.

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has noted the State party's argument that the communication is inadmissible under article 1 of the Optional Protocol since it relates to alleged discrimination within a private agreement over which the State party has no influence. The Committee observes that under articles 2 and 26 of the Covenant, the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of States parties are under an obligation to protect individuals against discrimination, whether it occurs within the public sphere or among private parties in the quasi-public sector of, for example, employment. The Committee further notes that the collective agreement at issue in the instant case is regulated by law and does not enter into force except on confirmation by the Federal Minister for Labour and Social Affairs. Moreover, the Committee notes that the collective agreement concerns the staff of the Social Insurance Board, an institution of public law implementing public policy. For those reasons, the Committee cannot agree with the State party's argument that the communication should be declared inadmissible under article 1 of the Optional Protocol.

8.3 The Committee notes that the author claims that he is a victim of discrimination, because his pension is based on the salary before 1 January 1992, without the monthly entitlement of 200 schillings which became effective for active employees on that date.

8.4 The Committee recalls that the right to equality before the law and to equal protection of the law without discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26 of the Covenant. In the instant case, the contested differentiation is based only superficially on a distinction between employees who retired before 1 January 1992 and those who retired after that date. Actually, the distinction is based on a different treatment of active and retired employees at the time. With regard to that distinction, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that it was not objective or how it was arbitrary or unreasonable. Therefore, the Committee concludes that the communication is inadmissible under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] See Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40), annex VIII.B, communication No. 172/1984 (Broeks v. the Netherlands), views adopted on 9 April 1987, para. 12.3.

Appendix

[Original: English]

Individual opinion of Committee members Francisco José Aguilar Urbina, Prafullachandra Natwarlal Bhagwati, Elizabeth Evatt, Andreas Mavrommatis and Cecilia Medina Quiroga

The author of this communication is challenging a distinction made between those employees of the Social Insurance Board who retired before January 1992 and those who retire after that date. The pension entitlements for each group are based on the current monthly salary of employees. Under a collective agreement between the Social Insurance Board in Salzburg and its employees, the salary of current employees can be supplemented by regular payments which do not form part of the monthly salary [para 2.2.]. By this means, it is possible to benefit current employees by payments which do not affect existing pensions in any way, but yet can be taken into account in calculating the pension for employees who retire on or after 1 January 1992.

The problem is to decide whether this distinction amounts to discrimination of a kind not permitted by article 26 of the Covenant.

To answer this question it is necessary to consider whether the aim of the differentiation is to achieve a purpose which is legitimate under the Covenant and whether the criteria for differentiation are reasonable and objective. The State party claims that the differentiation is based on reasonable grounds; the author, on the other hand, claims that the basis of differentiation is unreasonable and discriminatory. The author's claim falls within the scope of article 26 of the Covenant and raises a point of substance which cannot be determined without consideration of the issues outlined above, that is to say, without consideration of the merits of the case. The claim has thus been substantiated for purposes of admissibility.

Ideally, where the issues raised by the author involve claims of discrimination of this kind, and where there are no complex questions concerning admissibility (other than those concerning the substantiation of the claim of discrimination), the Committee should be able to call for submissions to enable it to deal with admissibility and merits in one step. However, that is not the procedure provided for in the rules and was not adopted for this case. In the absence of such a procedure, some cases such as the present one are found to be inadmissible because the Committee is of the view that the claim of discrimination has not been made out. This separate opinion emphasizes that a claim of discrimination which raises an issue of substance requiring consideration on the merits should be found admissible.

A further reason to have declared this particular case admissible is the fact that neither the State nor the author were given notice that the Committee would decide on admissibility having regard to the substance of the matter. The author himself pointed to the fact that the State's observations to his communication related mainly to the merits and were irrelevant for admissibility

(para. 7.1). A finding that the communication is inadmissible would deny to the author an opportunity to respond to the submission of the State party.

For these reasons we consider the communication admissible.

(Signed) Francisco José Aguilar Urbina,

Prafullachandra Natwarlal Bhagwati

Elizabeth Evatt

Andreas Mavrommatis

Cecilia Medina Quiroga

F. Communication No. 638/1995, Edward Lacika v. Canada (decision adopted on 3 November 1995, fifty-fifth session)

Submitted by: Edward Lacika

Alleged victim: The author

State party: Canada

Date of communication: 13 September 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1995,

Adopts the following decision on admissibility.

1. The author of the communication is Edward Lacika, a Canadian citizen, currently residing in Ontario. He claims to be a victim of violations by Canada of articles 14 and 26 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 In 1989, the author and his wife entered into a purchase and sale agreement with a construction company, Geranium Homes (Cobourg) Ltd. By consent of both parties, the closing date of the offer was 15 September 1989. On that date, the author informed his lawyer that he was not going to honour the agreement, since the house was built to sub-standard workmanship specifications. The author had commissioned two reports from two building inspection firms. The contractor in turn had obtained the corresponding occupancy permit from the building inspector of Cobourg, as well as an approved inspection carried out by the New Home Warranty Program.

2.2 On 19 September 1989, a letter from the contractor informed the author's lawyer that the contract had been terminated and that the author had forfeited his deposit.

2.3 The author requested a hearing before a tribunal (the Commercial Registration Appeal Tribunal) on the basis of the damages the inspections carried out by the New Home Warranty Program (8 September 1989) and the building inspector of Cobourg (13 September 1989) had caused him. He alleged that the inspections were manipulated and did not reveal four breaches of the building code and 23 other deficiencies in the house interior, such as the water services not being connected. This sub-standard workmanship was criticized in the reports the author had commissioned from the independent firms. In this respect, he states that the testimony presented by the representative of the New Home Warranty Program, Mr. P. L., during the hearing held on 18 January 1991, was contradictory. The author's claim was for the forfeited deposit and various damages, amounting to a total of $34,663.

2.4 The hearing was held on 19 January 1990, and the decision and order to dismiss the claim were issued on 28 March 1990. The appeal was heard and dismissed by the Divisional Court on 18 January 1991; no order as to costs was issued. The appeal did not deal with the allegation of discriminatory

treatment; a motion hearing for leave to appeal was held and dismissed by the Appeal Court of Ontario, on 27 May 1991, with no costs or reasons given. On 20 February 1992, the Supreme Court of Canada dismissed a motion for extension of time and an application for leave to appeal, without giving reasons.

The complaint

3. The author alleges that the hearings in his case were biased. In this respect, he submits that the respondents' lawyers were not even present, allegedly because they knew that no questions were going to be put to them. The author further alleges that the dismissal of his request for a non-discriminatory hearing was a violation of his rights, which shows that the Supreme Court of Ontario and the Supreme Court of Canada have no interest in protecting human rights; their attitude is said to violate articles 14 and 26 of the Covenant.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee observes that the allegations of discrimination and bias on the part of the Canadian courts have not been substantiated for purposes of admissibility: they remain blanket allegations and do not in any way reveal how the author's rights under articles 14 and 26 of the Covenant might have been violated. Therefore, the Committee concludes that the author has failed to advance a claim within the meaning of article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version.]

G. Communication No. 645/1995, Vaihere Bordes et al. v. France (decision adopted on 22 July 1996, fifty-seventh session)*

Submitted by: Mrs. Vaihere Bordes and Mr. John Temeharo [represented by counsel]

Victims: The authors

State party: France

Date of communication: 26 July 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 July 1996,

Adopts the following decision on admissibility.

1. The authors of the communication are Vaihere Bordes, Noël Narii Tauira and John Temeharo, all French citizens residing in Papeete, Tahiti, French Polynesia. All claim to be victims of violations by France of articles 6 and 17 of the International Covenant on Civil and Political Rights. The authors are represented by counsel.

Facts and claim

2.1 On 13 June 1995, French President Jacques Chirac announced that France intended to conduct a series of underground nuclear tests on the atolls of Mururoa and Fangataufa in the South Pacific. The authors challenge the decision of President Chirac, which they claim is in clear violation of international law. They contend that the tests represent a threat to their right to life and their right not to be subjected to arbitrary interference with their privacy and their family life. After the submission of the communication, six underground nuclear tests were carried out between 5 September 1995 and the beginning of 1996. According to the State party, those tests would be the last to be carried out by France, as President Chirac had announced France's intention to accede to the Comprehensive Nuclear-Test-Ban Treaty, which was scheduled to be adopted in late 1996.

2.2 The authors recall the general comments of the Human Rights Committee on the right to life, in particular general comment No. 14 (23), on nuclear weapons, and add that numerous studies show the danger to life caused by nuclear tests, because of the direct effects of the radiation on the health of individuals living in the test area, which manifests itself in an increased number of cancer and leukaemia cases, as well as genetic risks. Indirectly, human life is said to be threatened through the contamination of the food chain.

2.3 According to the authors, the French authorities have failed to take sufficient measures to protect their life and security. They claim that the authorities have not been able to show that the underground nuclear tests do not constitute a danger to the health of the inhabitants of the South Pacific and to

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* Pursuant to rule 85 of the rules of procedure, Committee member Christine Chanet did not participate in the examination of the communication.

the environment. They therefore request the Committee, under rule 86 of the rules of procedure, to ask France not to carry out any nuclear tests until an independent international commission has found that the tests are indeed without risk and do not violate any of the rights protected under the Covenant. Both during its fifty-fourth and fifty-fifth sessions, in 1995, the Committee decided not to grant interim protection under rule 86.

2.4 With regard to the requirement of exhaustion of domestic remedies, the authors contend that because of the urgent nature of their cases, they cannot be expected to await the outcome of judicial procedures before the French tribunals. It is further argued that domestic remedies are ineffective in practice and would fail to offer the authors any protection or any remedy.

The State party's submission on admissibility

3.1 In its submission under rule 91 of the rules of procedure, dated 22 January 1996, the State party challenges the admissibility of the communication on several grounds.

3.2 The State party argues that, in the first instance, the authors do not qualify as "victims" within the meaning of articles 1 and 2 of the Optional Protocol. In this context, it refers to the arguments developed in its submission to the European Commission of Human Rights in a case (No. 28024/95) virtually identical to that before the Committee. The State party provides a detailed description of the geology of the atoll of Mururoa, where most of the underground tests are carried out, and of the techniques developed for the conduct of the tests. Those techniques, the State party notes, are designed to provide a maximum of security and to minimize the risks of radioactive contamination of the environment and atmosphere. It dismisses the authors' argument that earlier underground tests in the 1970s and incidents said to have occurred during those tests have led to fissures in the atoll's geology and, thereby, increase the risk of radiation escaping from the underground shafts where the nuclear devices are tested through a process known as "venting".

3.3 The State party further rejects the argument that the tests expose the population of the islands surrounding the testing area to an increased risk of radiation. It recalls that the level of radioactivity at Mururoa is identical to that measured over and at other islands and atolls in the South Pacific and is, for example, less than that measured in metropolitan France: thus, the level of caesium 137 measured in French Polynesia in 1994 was one third of the level measured at the same date in France and in the northern hemisphere, where, it is noted, the emissions resulting from the nuclear accident which occurred at Chernobyl (Ukraine) in 1985 are still clearly measurable.

3.4 Similar considerations apply to the alleged and expected contamination of the food chain through the nuclear tests. The State party refutes the authors' argument that they run a risk of contamination through consumption of agricultural products produced and fish caught in proximity of the testing area. It points out that all serious scientific studies on the environmental effects of underground nuclear tests have concluded that whatever radioactive elements reach the surface of the lagoon at Mururoa or Fangataufa are subsequently diluted by the ocean to levels which are perfectly innocuous for the marine fauna and flora and, a fortiori, for human beings. In the same vein, the State party rejects as unfounded and unsubstantiated the authors' contention that the incidence of cases of cancer has risen in French Polynesia as a result of French nuclear tests in the area.

3.5 The State party notes that it has granted access to the testing area to several independent commissions of inquiry in the past, including, in 1982, a mission led by the internationally recognized vulcanologist Haroun Tazieff; in 1983, a mission of experts from New Zealand, Australia and Papua New Guinea; and one, in 1987, by J. Y. Cousteau. That the monitoring of the environmental effects of the tests carried out by the French authorities has been serious and of high quality has been confirmed, inter alia, by the Lawrence Livermore Laboratory in California and the International Laboratory of Marine Radioactivity in Monaco.

3.6 In the light of the above, the State party affirms that the authors have failed to discharge the burden of proof that they are "victims" within the meaning of article 1 of the Optional Protocol. It notes that the authors cannot argue that the risk to which they might be exposed through the nuclear tests would be such as to render imminent a violation of their rights under articles 6 and 17 of the Covenant. Purely theoretical and hypothetical violations, however, do not suffice to make them "victims" within the meaning of the Optional Protocol.

3.7 Subsidiarily, the State party contends that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, since two of the authors, Mrs. Bordes and Mr. Tauira, are co-authors of the complaint which was placed before the European Commission of Human Rights and registered by that body in August 1995 (case No. 28204/95). The State party recalls its reservation to article 5, paragraph 2 (a), pursuant to which the Committee "shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement".[a] As the case which was examined by the European Commission and declared inadmissible on 4 December 1995 in fact concerned the alleged unlawfulness of the French nuclear tests and thus the "same matter", the Committee's competence in respect of the present case is said to be excluded.

3.8 Equally subsidiarily, the State party submits that the complaint is inadmissible on the basis of non-exhaustion of domestic remedies. It refers to its arguments developed before the European Commission of Human Rights on this point: thus, the authors could have filed a complaint before the Conseil d'État and argued that President Chirac's decision to resume nuclear tests constituted an abuse of (executive) power (... recours pour excès de pouvoir). Contrary to what the authors affirm, such a recourse could not a priori be deemed futile or ineffective. Furthermore, the State party notes that as the authors essentially invoke the potential risks which the tests entail for their health and the environment, they should have requested compensation from the competent authorities, which they failed to do. If their request had been rejected, they could have filed a complaint before the administrative tribunals, invoking the State's no fault responsibility (responsabilité sans faute).

3.9 Finally, the State submits that the authors' claim is incompatible ratione materiae with articles 6 and 17 of the Covenant. For the State party, article 6 only applies in the event of a real and immediate threat to the right to life, which presents itself with some degree of certainty; such is not the case in the authors' situation. Similar considerations apply to article 17, where the prohibited unlawful interference with private or family life is a real and effective interference, not the risk of a purely hypothetical interference.

4.1 In her comments, dated 8 April 1996, counsel for the authors contends that the risk of adverse effects of the nuclear tests already carried out on the authors' life, health and environment is real and serious. She deplores the absence of an independent international investigation into the impact of the programmed and concluded tests. She criticizes the lack of transparency of the French authorities, which are said to even misrepresent the true number of underground nuclear tests carried out on Mururoa and Fangataufa since the 1970s. She further points out that even the reports invoked by the State party itself (see para. 3.5 above) contain passages which caution that the danger of escape of radioactive particles (caesium 134, iodium 131) from the underground shafts and, consequently, contamination of the atmosphere is real; however, the State party has chosen to invoke only those conclusions favourable to its position.

4.2 Counsel argues that the tests do have an adverse impact on the marine environment in the testing area and from there have repercussions on the whole region's ecosystem, by propagation of radiation through the food chain, especially fish. She notes that a July 1995 report prepared by Médecins sans frontières rightly criticizes the absence of medical supervision of the population of French Polynesia in the aftermath of the nuclear tests.

4.3 It is submitted that the nuclear tests carried out will, with some degree of probability, increase the incidence of cases of cancer among inhabitants of French Polynesia. Counsel concedes that it is too early to gauge the extent of the contamination of the ecosystem, the marine environment and the food chain by radiation, as cancers may take 10 to 30 years to develop and manifest themselves; the same is true for genetic malformations. She notes that some reports have revealed the presence of iodium 131 in significant quantities in the lagoon of Mururoa after the tests, and surmises that the discovery of caesium 134 in the lagoon's waters is an indicator of the leaky nature of the underground shafts, from which more radioactivity is likely to escape in the future. Finally, negative effects are expected from the poisoning of fish in the South Pacific by a toxic substance found on algae growing on dead coral reefs, and which trigger a disease known as ciguatera; there is said to be a correlation between the conduct of nuclear tests in the South Pacific and the increase in poisoning of fish and of human beings by ciguatera.

4.4 On the basis of the above, counsel argues that the authors do qualify as victims within the meaning of article 1 of the Optional Protocol. The risks to the health of Mr. Temeharo and Mrs. Bordes are said to be significant, clearly exceeding the threshold of purely hypothetical threats. The evaluation of the threats to the authors' rights under articles 6 and 17 can only be made, according to counsel, during evaluation of the merits of the authors' claims. For purposes of admissibility, the burden of proof is said to have been discharged, as the authors have made prima facie substantiated allegations.

4.5 Counsel denies that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol. She notes that Mrs. Bordes withdrew her complaint from the European Commission of Human Rights by letter of 17 August 1995; conversely, Mr. Tauira withdrew his complaint from consideration by the Human Rights Committee by letter of 18 August 1995. Counsel further contends that the French reservation to article 5, paragraph 2 (a), of the Optional Protocol is inapplicable in the present case: in this context, she affirms that the reservation only applies if the "same matter" has been the subject of a decision on the merits by another instance of international investigation or settlement. In the instant case, the European Commission of

Human Rights declared the case presented to it inadmissible, without entering into a debate on the merits of the authors' claims.

4.6 Counsel submits that the authors should be deemed to have complied with the requirement of exhaustion of domestic remedies, since available judicial remedies are clearly ineffective. In this context, she notes that President Chirac's decision to resume nuclear tests in the South Pacific is not susceptible of judicial control: this is said to be confirmed by the jurisprudence of the French Conseil d'État, the highest administrative tribunal. Thus, in a judgement handed down on 11 July 1975 in the case of Sieur Paris de Bollardière, the Conseil d'État had already held that the establishment of a security zone around the nuclear testing areas in the South Pacific was a governmental decision ("acte de gouvernement") which could not be dissociated from France's international relations and was not susceptible to control by national tribunals. The same considerations are applicable to the present case. Counsel further notes that the French section of Greenpeace challenged the resumption of nuclear tests before the Conseil d'État: by a judgement of 29 September 1995, the Conseil d'État dismissed the complaint, on the basis of the "act of government" theory.

4.7 Counsel reiterates that the authors' complaints are compatible ratione materiae with articles 6 and 17 of the Covenant. As far as article 6 is concerned, she recalls that the Human Rights Committee has consistently, including in general comment No. 6 (16), on article 6, argued that the right to life must not be interpreted restrictively and that States should adopt positive measures to protect that right. In the context of examination of periodic State reports, for example, the Committee has frequently inquired into States parties' policies relating to measures to reduce infant mortality or improve life expectancy and policies relating to the protection of the environment or of public health. Counsel emphasizes that the Committee itself has stated, in its general comment No. 14 (23) of 2 November 1984, that the development, testing, possession and deployment of nuclear weapons constitute one of the most serious threats to the right to life.

4.8 As far as the authors' claim under article 17 is concerned, counsel notes that the risks to the authors' family life are real: thus, the danger that they will lose a member of their family through cancer, leukaemia, ciguatera or other illnesses increases as long as measures are not taken to prevent the escape of radioactive material, set free by the underground tests, into the atmosphere and environment. This is said to constitute unlawful interference in the authors' right to their family life.

Issues and proceedings before the Committee

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that Mr. Tauira withdrew his communication from consideration by the Committee by letter dated 18 August 1995, so as to enable him to present his case to the European Commission of Human Rights. In this respect, therefore, the Committee discontinues consideration of his complaint. Conversely, Mrs. Bordes withdrew her application to the European Commission by telefax of 17 August 1995, before any decision was adopted by the European Commission of Human Rights. Given, therefore, that the authors of the case

which was before the European Commission and of the present case are not identical, the Committee need not examine whether the French reservation to article 5, paragraph 2 (a), of the Optional Protocol applies in the present case.

5.3 In the initial communication, the authors challenge President Chirac's decision to resume nuclear underground tests on Mururoa and Fangataufa as a violation of their rights under articles 6 and 17 of the Covenant. In subsequent letters, they reformulate their claim in that the actual conduct of tests has increased the risks to their lives and for their families.

5.4 The Committee has noted the State party's contention that the authors do not qualify as "victims" within the meaning of article 1 of the Optional Protocol. It recalls that for a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or omission of a State party has already adversely affected his or her enjoyment of such right or that there is a real threat of such result.[b]

5.5 The issue in the present case, therefore, is whether the announcement and subsequent conduct of underground nuclear tests by France on Mururoa and Fangataufa resulted in a violation, specific to Mrs. Bordes and Mr. Temeharo, of their right to life and their right to their family life or presented an imminent threat to their enjoyment of such rights. The Committee observes that, on the basis of the information presented by the parties, the authors have not substantiated their claim that the conduct of nuclear tests between September 1995 and the beginning of 1996 placed them in a position in which they could justifiably claim to be victims whose right to life and to family life was then violated or was under a real threat of violation.

5.6 Finally, as to the authors' contention that the nuclear tests will cause, inter alia, further deterioration of the geological structure of the atolls on which the tests are carried out and further fissures of the limestone caps of the atolls and thereby increase the likelihood of an accident of catastrophic proportions, the Committee notes that that contention is highly controversial even in concerned scientific circles; it is not possible for the Committee to ascertain its validity or correctness.

5.7 On the basis of the above considerations and after careful examination of the arguments and materials before it, the Committee is not satisfied that the authors can claim to be victims within the meaning of article 1 of the Optional Protocol.

5.8 In the light of the above, the Committee need not address the other inadmissibility grounds that have been adduced by the State party.

5.9 Although the authors have not shown that they are "victims" within the meaning of article 1 of the Optional Protocol, the Committee wishes to reiterate, as it observed in its general comment No. 14 (23), adopted on 2 November 1984, that: "It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today."[c]

6. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 1 of the Optional Protocol;

(b) that this decision shall be communicated to the State party, to the authors and to their counsel.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] See Multilateral treaties deposited with the Secretary-General, part I, chap. IV.5 (United Nations publication, Sales No. E.96.V.5).

[b] See Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), vol. II, annex XIII.G, communication No. 429/1990 (E. W. et al. v. the Netherlands), decision of 8 April 1993, para. 6.4.

[c] Ibid., Fortieth Session, Supplement No. 40 (A/40/40), annex VI, para. 4.

H. Communication No. 656/1995, V. E. M. v. Spain (decision adopted on 30 October 1995, fifty-fifth session)

Submitted by: V. E. M.

Alleged victim: The author

State party: Spain

Date of communication: 13 June 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 October 1995,

Adopts the following decision on admissibility.

1. The author of the communication is V. E. M.,[a] a Spanish citizen residing in Barcelona, Spain. He claims to be the victim of violations by Spain of articles 3; 7; 14, paragraphs 1, 2, 3 (a) to (e), and 5; 17; and 26 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author, a military officer, was dishonourably discharged from the Spanish Army in 1975 by a special tribunal (Tribunal de Honor) which found him guilty of tolerating the alleged dishonourable lifestyle of his wife. The author did not appeal his sentence, as the decisions of the Tribunal de Honor were not appealable under article 40 (a) of the (old) Spanish Code of Military Procedure (1945).

2.2 On 5 May 1991, the author filed an application for review to declare invalid the 1975 decision of the Tribunal de Honor and thus declare null and void the act by which he was dismissed. He further filed an administrative complaint (Recurso Contencioso Disciplinar Militar) with the Supreme Court (Tribunal Supremo), requesting a declaratory judgement to the effect that the Tribunal de Honor had been invalidly established and therefore any decision it issued would also be null and void.

2.3 On 30 May 1994, the Military Chamber of the Supreme Court (Sala de lo Militar) dismissed the case on the grounds that the conditions of articles 47 and 109 of the law governing administrative procedures for the revision of final (judicial) decisions had not been met. The judgement further held that the author's appeal was barred by the relevant statutes of limitations, since the deadline for filing the appeal had begun to run from the date of establishment of the Constitutional Court (1981); two judges of the Supreme Court appended dissenting opinions to the judgement of 30 May 1994.

The complaint

3.1 The author contends that the Supreme Court judgements issued in 1992 and 1994, which confirm the judgement of the Tribunal de Honor, constitute violations of the following provisions of the Covenant: articles 3; 7; 14, paragraphs 1, 2, 3 (a) to (e), and 5; 17; and 26, and refers to his previous communication in substantiation of his claim.

3.2 The author states that the present communication, although relating to the same facts, is different from communication No. 467/1991, the facts of which had been submitted to the European Commission of Human Rights. He claims, in this respect, that the object of the present communication is the violation of his rights by the judgements issued by the Supreme Court on 5 May 1992 and 30 May 1994. The author emphasizes this fact, lest the State party contend anew that the Human Rights Committee is precluded from analysing the communication because it has already been submitted to another procedure of international investigation or settlement.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee observes that while it cannot consider facts that occurred in 1975, prior to the entry into force of the Covenant for Spain (27 July 1977), it can ascertain whether the procedural guarantees were observed during the 1992 and 1994 proceedings.

4.3 The Committee has examined the judgements of the Spanish Supreme Court of 5 May 1992 and 30 May 1994. Those judgements reveal that the author's arguments were considered by the court. However, the author has not substantiated his claim that the court acted arbitrarily or that it discriminated against him. Therefore, the Committee concludes that the communication is inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] A prior communication from V. E. M., No. 467/1991, was examined and declared inadmissible by the Committee on 16 July 1993, under article 5, paragraph 2 (a), of the Optional Protocol: see Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), vol. II, annex XIII.J.

I. Communication No. 657/1995, Gerrit van der Ent v. the Netherlands (decision adopted on 3 November 1995, fifty-fifth session)

Submitted by: Gerrit van der Ent [represented by counsel]

Alleged victim: The author

State party: The Netherlands

Date of communication: 19 September 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1995,

Adopts the following decision on admissibility.

1. The author of the communication is Gerrit van der Ent, a Dutch citizen, domiciled in Wageningen. He claims to be a victim of a violation by the Netherlands of articles 6, 7, and 18 of the Covenant. He is represented by counsel.

The facts as submitted by the author

2.1 On 19, 20, 21 and 22 February 1990, the author repeatedly damaged the wire fences around military barracks in The Hague, in protest against the sale of war planes to Turkey. By decision of 13 March 1990, the district court in The Hague found him guilty of wilfully damaging public property and sentenced him to three weeks' imprisonment. On appeal, the Court of Appeal, by judgement of 27 December 1990, confirmed the author's conviction but lowered the sentence to two weeks' imprisonment. The author's cassation appeal was rejected by the Supreme Court on 28 April 1992.

2.2 On 28 December 1990, the author participated in a protest against the alleged continuing militarization of the Netherlands and the involvement of the Netherlands economy, actively supported by the State, in the production and sale of weapons, resulting in wars elsewhere in the world. In the course of the protest, the author, together with others, damaged the fence around the air base Volkel. By judgement of 25 September 1991, the district court of 's Hertogenbosch found him guilty of public violence, in contravention of article 141 of the Dutch Penal Code, and sentenced him to a fine of f. 100. On appeal, the Court of Appeal of 's Hertogenbosch, by judgement of 28 December 1992, confirmed the conviction and raised the fine to f. 250. The author's appeal in cassation to the Supreme Court was rejected on 9 November 1993.

The complaint

3. The author claims that his convictions by the courts in the Netherlands constitute a violation of articles 6, 7 and 18 of the Covenant. In this context, he points out that he has already tried every legal means in order to draw attention to the fact that the Dutch Government is violating international law by its military policy. He therefore argues that he can denounce the indirect participation of the Netherlands in war crimes, such as the Turkish bombardments against the Kurdish population, only by breaking the law and that

the Dutch courts should have recognized his conscientious objections by not convicting him.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee notes that the author claims that, because the Dutch policy with regard to the sale of weapons and warplanes allegedly is in violation of international law, he should not have been convicted for public violence and damaging public property. In this context, the Committee refers to its jurisprudence in communication No. 429/1990,[a] in which it observed that the procedure laid down in the Optional Protocol was not designed for conducting public debate over matters of public policy, such as support for disarmament and issues concerning nuclear and other weapons of mass destruction or, as in the instant case, issues concerning arms sales.

4.3 Before the Committee can examine a communication, the author must substantiate, for purposes of admissibility, his claims that his rights under the Covenant have been violated. In the instant case, the Committee notes that the author merely refers to his conviction for public violence and wilfully damaging public property, but fails to substantiate, for purposes of admissibility, how this would entail a violation of his rights under articles 6, 7 and 18 of the Covenant. The communication is therefore inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] See Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), vol. II, annex XIII.G (E. W. et al. v. the Netherlands), decision of 8 April 1993, para. 6.2.

J. Communication No. 660/1995, Cornelis J. Koning v. the Netherlands (decision adopted on 3 November 1995, fifty-fifth session)

Submitted by: Cornelis Johannes Koning [represented by counsel]

Alleged victim: The author

State party: The Netherlands

Date of communication: 5 January 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1995,

Adopts the following decision on admissibility.

1. The author of the communication is Cornelis Johannes Koning, a Dutch citizen, domiciled in Eindhoven, the Netherlands. He claims to be a victim of a violation by the Netherlands of articles 14 and 19 of the Covenant. He is represented by counsel.

The facts as submitted by the author

2.1 On 9 and 12 August 1991, the author, a peace activist, who had been sentenced to suspended sentences on at least two prior occasions, caused damages to an air force communications mast at the military complex of Erp, the Netherlands, in protest against the alleged continuing militarization of the Netherlands and the involvement of the Netherlands economy, actively supported by the State, in the production and sale of weapons, resulting in wars elsewhere in the world. By judgement of 21 November 1991, the district court of 's Hertogenbosch found him guilty of endangering air traffic and sentenced him to eight months' imprisonment. On appeal filed by the prosecution, the Court of Appeal of 's Hertogenbosch, by judgement of 5 March 1992, increased the author's sentence to 16 months' imprisonment. The author's appeal in cassation to the Supreme Court was rejected on 25 May 1993.

2.2 It appears from the trial documents that the author informed the investigating magistrate on 10 October 1991 that he did not wish to be represented by counsel and that he asked to be given a copy of his file. On 11 October 1991, the magistrate transmitted to him a copy of part of the file and referred him to counsel who had represented him until 10 October for the remaining part of the file, since only one copy could be provided. The author raised this issue in cassation, arguing that the failure of the magistrate to give him a copy of the whole file violated the right to a fair trial. The Supreme Court dismissed that argument.

2.3 The author states that the public prosecutor informed the investigating magistrate on 24 October 1991 that the author had been summoned, whereas the summons was only served upon him on 25 October 1991. In cassation, it was argued that that amounts to a violation of the right to a fair trial and that the Court of Appeal should have declared the summons null and void ex officio. The Supreme Court, however, rejected that argument.

2.4 The author further submits that he was informed on 24 January 1992 that the public prosecutor had appealed the judgement of the district court to the Court of Appeal. The President of the Court of Appeal set the hearing for 20 February 1992. The author claims that the court documents show that the President of the Court of Appeal had urged the district court in December 1991 to forward the trial documents, and showed that he intended to deal with the appeal expeditiously in order to prevent the author from being released from detention before the appeal had been decided upon. The author claims that that showed that the President of the Court of Appeal was biased against him.

2.5 The author further submits that the Court of Appeal arbitrarily confiscated certain letters which were in his possession when he was arrested, pertaining to protest actions in the context of the commemoration of the bombing of Hiroshima and Nagasaki.

The complaint

3. The above is said to constitute violations of articles 14 and 19 of the Covenant.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee has carefully examined all the material submitted by the author and considers that, with regard to his claim under article 19, the information before it does not substantiate, for purposes of admissibility, how the confiscation, in the context of the criminal proceedings against him, of certain papers pertaining to protest actions against nuclear weapons would constitute a violation of the right to freedom of expression.

4.3 Furthermore, the Committee considers that the author has failed to substantiate, for purposes of admissibility, how the alleged irregularities in his trial would constitute a violation of the right to a fair hearing under article 14 of the Covenant.

5. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 2 of the Optional Protocol;

(b) that this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version.]

K. Communication No. 664/1995, Gesina Kruyt-Amesz et al. v. the Netherlands (decision adopted on 25 March 1996, fifty-sixth session)

Submitted by: Gesina Kruyt-Amesz, Hendrik Gerrit Schraa, Hendrikus Gerardus Maria Karis and Maria Johanna Josephina Moors [represented by counsel]

Alleged victims: The authors

State party: The Netherlands

Date of communication: 30 January 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1996,

Adopts the following decision on admissibility.

1. The authors of the communication are Gesina Kruyt-Amesz, Hendrik Gerrit Schraa, Hendrikus Gerardus Maria Karis and Maria Johanna Josephina Moors, Dutch citizens. They claim to be victims of a violation by the Netherlands of article 15 of the Covenant. They are represented by counsel.[a]

The facts as submitted

2.1 On 16 July 1989, the authors, in cooperation with others, removed part of the wire fence and illegally gained access to the naval air base at Valkenburg in order to plant trees as a protest against the continuing militarization of the Netherlands and especially against the nuclear strategy of the Netherlands defence policy. As a justification for their action, they refer to the Nuremberg judgement, which found that individuals have international duties that transcend the national obligations of obedience imposed upon them by States. They emphasize that the action of 16 July 1989 was openly prepared and that a statement was given to the press, signed by the participants, that the action was going to take place. The protest was carried out according to the principles of non-violence against persons, and the activists remained on the air base until captured by the police.

2.2 By judgement of 25 January 1991, the district court of The Hague found the authors guilty of membership of a criminal organization, in contravention of article 140 of the Dutch Penal Code, and sentenced them to a fine of f. 1,000, f. 750, f. 750 and f. 1,500, respectively, and to suspended sentences of four weeks' imprisonment for Mrs. Moors and of two weeks' imprisonment for the others. On appeal, the Court of Appeal of The Hague, by judgement of 9 June 1992, sentenced the authors to two weeks' imprisonment. The authors' appeal in cassation to the Supreme Court was rejected on 11 May 1993.

The complaint

3. The authors submit that their conviction is in violation of article 15 of the Covenant, since article 140 of the Penal Code is so broad that it could not have been foreseen that it was applicable to their participation in the protest.

Issues and proceedings before the Committee

4.1 Before considering any claim in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The authors claim to be victims of a violation of article 15 of the Covenant because they could not have foreseen that article 140 of the Criminal Code, on the basis of which they were convicted, was applicable to their case. The Committee refers to its established jurisprudence[b] that interpretation of domestic legislation is essentially a matter for the courts and authorities of the State party concerned. Since it does not appear from the information before the Committee that the law in the present case was interpreted and applied arbitrarily or that its application amounted to a denial of justice, the Committee considers that the communication is inadmissible under article 3 of the Optional Protocol.

5. The Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the authors of the communication and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

[a] See also Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40), vol. II, annex XI.K, communication No. 578/1994 (De Groot v. the Netherlands), decision adopted on 14 July 1995, declaring the communication inadmissible.

[b] See, inter alia, the Committee's decision in communication No. 58/1979 (Anna Maroufidou v. Sweden), views adopted on 9 April 1981), in Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40), annex XVII, para. 10.1.